No. 82-1605

Office-Supreme Court, U.S.
FILED
MAR 28 1983
ALEXANDER L. STEVAS,
CLERK

In The

Supreme Court of the United States

OCTOBER TERM, 1983

IN RE: APPEAL OF THERESA McGINNIS FROM THE DECISION OF THE LANGHORNE MANOR BOROUGH ZONING HEARING BOARD

THERESA McGINNIS, PETITIONER

PETITION FOR A WRIT OF CERTIORARI TO THE COMMONWEALTH COURT OF PENNSYLVANIA.

DAVID H. MOSKOWITZ
Moskowitz, Zamparelli & Weiss, P.C.
Suite 414, One Oxford Valley
Langhorne, Pennsylvania 19047
(215) 752-7770

Attorneys for Petitioner

THE SUPERIOR APPELLATE PRINTING COMPANY
P O BOX 363
CRANBURY, N J 08512
AREA CODE 609
443-4202

QUESTIONS PRESENTED

1. Where a group of unrelated individuals create a family living arrangement in a single-family residential zoning district, (a) does the group have a constitutional right to exist as a family, and (b) is the means by which the family living arrangement is made financially feasible determinative of whether it constitutes a family for zoning purposes?

2. Is it a denial of the constitutional right of adults and especially elderly adults, to equal protection to hold that the functional equivalent of a biological family must consist of parent and dependent child?

3. May a municipality make a decision which will force elderly residents to levae their homes, without determining the constitutional rights of the elderly to due process of law and protection of those rights?

TABLE OF CONTENTS

Page

Petition for Writ of Certiorari to the Commonwealth Court of Pennsylvania 1

The Opinions Below 2

Jurisdiction 3

Constitutional and Statutory Provisions Involved. 4

Statement of the Case. 5

Reasons for Granting the Writ. 16

I. THIS COURT SHOULD ISSUE A WRIT OF CERTIORARI BECAUSE THIS CASE PRESENTS AN IMPORTANT UNSETTLED CONSTITUTIONAL QUESTION WHICH HAS BEEN DECIDED DIFFERENTLY BY STATE COURTS. 16

A. A GROUP OF UNRELATED INDIVIDUALS WHO CREATE A FAMILY IN A SINGLE-FAMILY RESIDENTIAL ZONING DISTRICT IS ENTITLED TO CONSTITUTIONAL PROTECTION AND A HEIGHTENED LEVEL OF SCRUTINY . . . 16

B. THE MEANS BY WHICH A FAMILY LIVING ARRANGEMENT IS MADE FINANCIALLY FEASIBLE ARE NOT DETERMINATIVE OF WHETHER IT CONSTITUTES A FAMILY FOR ZONING PURPOSES. 29

TABLE OF CONTENTS

Page

II. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE CONSTITUTIONAL RIGHTS OF ADULTS, ESPECIALLY ELDERLY ADULTS TO EQUAL PROTECTION ARE ADVERSELY AFFECTED BY THE DECISION OF THE COMMONWEALTH COURT OF PENNSYLVANIA WHICH CONSTITUTIONAL RIGHTS HAVE NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT. 34

III. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE ELDERLY RESIDENTS OF THE McGINNIS HOME HAVE A CONSTITUTIONAL RIGHT TO DUE PROCESS BEFORE A DECISION IS MADE THAT WILL REQUIRE THEM TO LEAVE THEIR HOMES. 43

Conclusion 48

Appendix A 1a

Opinion of the Zoning Hearing Board of Langhorne Manor Borough dated June 11, 1960

Appendix B 10a

Opinion of the Court of Common Pleas of Bucks County (Biester,J.) dated March 24, 1981

Appendix C 34a

Opinion of the Commonwealth Court of Pennsylvania dated July 29, 1982

TABLE OF CONTENTS

Page

Appendix D 62a

Constitutional and Statutory Provisions Involved

Appendix E 64a

Questions Presented

CITED AUTHORITIES

Cases — Page

Berger v. State, 71 N.J. 206, 364 A.2d 993(1976). 27

Bracco v. Lackner, 462 F.Supp 436 (N.D. Cal 1978). 44

Brede v. Director for Department of Health, 616 F.2d 407 (9th Cir. 1980). 43,44

Bumpus v. Clark, 681 F.2d 679 (9th Cir. 1982). 44

Burchette v. Dumpson, 387 F. Supp 812 (E.D.N.Y.1974). . . 43

Children's Home of Easton v. City of Easton,53 Pa.Cmwlth. Ct.216,417 A.2d 830(1980) . . . . 32,35,36 ,39

City of Des Plaines v. Trotter, 34 Ill.2d 432, 516, N.E. 2d 116(1966). 26

City of Santa Barbara v. Adamson, 27 Cal. 3d 123, 610 P.2d 436 (1980). . 21,25,26

City of White Plains v. Ferraioli, 34 N.Y. 2d 300, 357 N.Y.S.2d 449, 313, N.E. 2d 756 (1974) 27

Costley v. Caromin House, Minn., 313 N.W.2d 21 (1981) 32

CITED AUTHORITIES

Cases	Page
Crowley v. Knapp, 94 Wis 2d 42, 288 N.W. 2d 815(1980). . . .	33
Doe v. Bolton, 410 U.S. 179, 93 S.Ct.739,35 L.ED.2d 201 (1973)	47
Hopkins v. Zoning Hearing Board of Abington Township 55 Pa. Cmwlth. Ct.365,423 A.2d 1082 (1980) . .	32,35,36,38
Klein v. Mathews, 430 F. Supp, 1005 (D.N.J. 1978)	.43
Lakeside Youth Service v. Zoning Hearing Board of Upper Moreland Township, 51 Cmwlth Ct. 485, 414 A.2d 1115(1980)	.35
McGinnis v. Zoning Hearing Board of Langhorne Manor Borough,136 Bucks Co. L. Rep. 115 (1981) aff'd in part, rev'd in part__Pa. Cmwlth Ct.__,448A.2d 108(1982)	Passim
Moore v. City of E. Cleveland, Ohio, 431 US 494, 97 S. Ct. 1932, 52 L. Ed 2d 531 (1971)	17,21,24,36
Neptune Park Association v. Steinberg, 138 Co 357 84 A.2d 687 (1951).	27

CITED AUTHORITIES

Cases — Page

Pennsylvania George Junior Republic v. Zoning Hearing Board of Cool Springs Township, 37 Pa. Cmwlth Ct. 151, 389, A.2d 261 (1978). . . . 35

Sierra Club v. Morton, 405 U.S. 737, 92, S.Ct. 1361, 31 L. Ed 2d 636(1972) . . . 46

State ex rel Region II Child & Family Services v. District Court of the Eighth Judicial Circuit, 609 P. 2d 245 (Mont. 1980). 27

Township of Pemberton v. State of New Jersey, 178 N.J. Super 346, 429, A.2d 360 (1981). 27

Village of Belle Terre v. Boraas, 416 U.S. 1 (1974). Passim

Wengert v. Zoning Hearing Board of Upper Merion 51 Pa. Cmwlth Ct. 79, 414 A2d 148 (1980). 35

Yaretsky v. Blum, 629 F.2d 817 (2d Cir. 1980), rev.d other grounds __U.S.__, 102 S.Ct 2777 (1982). . . .43,44

CONSTITUTION OF THE UNITED STATES

First Amendment . . . . . .

Fourteenth Amendment . . . .

ZONING ORDINANCE OF LANGHORNE MANOR BOROUGH
Section 215 . . . . . .

Petition

IN THE SUPREME COURT
OF PENNSYLVANIA

OCTOBER TERM, 1983

THERESA McGINNIS,

Petitioner

IN RE: APPEAL OF THERESA McGINNIS FROM THE DECISION OF THE LANGHORNE MANOR BOROUGH ZONING HEARING BOARD

PETITION FOR A WRIT OF CERTIORARI TO THE COMMONWEALTH COURT OF PENNSYLVANIA

The Petitioner, Theresa McGinnis, prays that a Writ of Certiorari issue to review the judgment and order of the Commonwealth Court of Pennsylvania rendered in these proceedings on July 29, 1982 and the denial of Petition to allow appeal of said decision by the Supreme Court of Pennsylvania on December 28, 1982.

THE OPINIONS BELOW

The Opinion of the Commonwealth Court of Pennsylvania is reported at ___Pa. Cmwlth Ct.__, 448 A.2d 108 (1982) and appears herein as Appendix C. The Denial of the Supreme Court of Pennsylvania of the Petition for Allowance of Appeal is by letter and is not reported.

The Opinion of the Zoning Hearing Board of Langhorne Manor Borough appears herein as Appendix A. The opinion of the Court of Common Pleas of Bucks County (Biester, J.) is reported at 36 Bucks County L. Rep. 115 (1981) and Appears herein as Appendix B.

JURISDICTION

(i) The judgment of the Commonwealth Court of Pennsylvania which is sought to be reviewed was entered on July 29, 1982. See Appendix C, infra. On August 30, 1982, Petitioner filed a Petition for Allowance of Appeal to the Supreme Court of Pennsylvania which denied the Petition on December 28, 1982. This petition for certiorari was filed within ninety (90) days from the date of the aforesaid judgment.

(ii) Jurisdiction to review the judgment of the Commonwealth Court of Pennsylvania by writ of certiorari is conferred on this Court by Title 28 of the United States Code, Section 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES INVOLVED

1. The following provisions of the Constitution of the United States are involved:

   Amendment I

   Amendment XIV

2. The following provision of the Zoning Ordinance of Langhorne Manor Borough is involved:

   Section 215

The full text of the Amendment to the Constitution and Ordinance Provision are set forth in Appendix D which is attached hereto.

STATEMENT OF THE CASE

Petitioner Theresa McGinnis individually purchased the subject property located at 401 Station Avenue, Langhorne Manor Borough, Bucks County, Pennsylvania in June of 1979. The property is zoned R.A. Single Family Residential. Langhorne Manor Borough is less than 1 mile long, contains .65 square miles and has 17% of its area zoned institutional, all of which is owned by two schools and a nursing home. The Borough contains 276 residential homes, some of which are occupied as multifamily homes and others of which have professional or commercial accessory uses. In June or July of 1979, Ms. McGinnis moved into the property with several senior citizens.

After written notice to McGinnis requesting her to cease and desist from using the aforesaid property as a

nursing home or convalescent home in violation of the Zoning Ordinance, the Langhorne Manor Borough Zoning Officer, on October 10, 1979, cited McGinnis for failure to comply with Section 215 of the Zoning Ordinance. McGinnis then appealed from the issuance of the citation to the Zoning hearing Board of Langhorne Manor Borough and, simultaneously, requested a variance from the use regulations of the R.A. District, or, in the alternative, a determination that Section 215 of the Langhorne Manor Borough Zoning Ordinance was unconstitutional in general or as applied to her property. Hearings were held by the Langhorne Manor Borough Zoning Hearing Board on January 9, 1980, January 30, 1980, March 26, 1980, and April 2, 1980. At the January 30, 1980 hearing, McGinnis requested that her application also be regarded as asking

for a special exception residential conversion under Section 403(c) of the Zoning Ordinance. No decision was ever rendered on this application.

The subject property is a very large English Tudor house with three floors, plus attic and cellar. (R.19(a))[1]. Its immediate previous use was as a physician's residence with attached medical offices. (R.22(a)-23(a)). The first floor of the house consists of a foyer, dining room, kitchen, patio, enclosed porch, two powder rooms, laundry and sitting room. (R.24(a)-30(a). The

---

[1] "R" references are to the reproduced record of the testimony before the Zoning Hearing Board appellee in the Court of Common Pleas, entered March 24, 1981 Bucks County at No. 80-7453-14-5.

former medical offices are also on this floor and consist of three (3) additional rooms which are being used as a bedroom suite. (R.23(a)). The second floor of the house contains five (5) bedrooms, a converted sitting room and three full baths. (R.31(a)-33(a)). McGinnis has equipped the home with an electric eye garage, mechanical chair for access to the second floor and a comprehensive smoke alarm system. (R.21(a)-22(a), 30(a)).

At the time of the hearings, Ms. McGinnis and six (6) senior citizens lived in the home, at least one of whom is her relative. (R.35(a)-36(a)). Although Ms. McGinnis has a B.S. and an M.A. in nursing, she is not providing nursing care for the individuals in the subject house, all of whom are ambulatory, continent, and capable, in varying degrees, of taking care of most

of their own physical needs. (R.37(a)-39(a)).

Individual residents are charged what they and their families can afford although the exact fee arrangements for several of the individuals were not disclosed. (R.64(a), 70(a), 286(a)-287(a)). The charges vary from $14.00 a day to $20.00 a day depending upon the degree of supervisory care which the resident requires. Each of the residents testified as to a desire to remain permanently in the home, that each performed household tasks within her capability and tended to the household pets and that they considered themselves to be a family. Ms. McGinnis receives compensation from the operation of the home and spends all of her time there, assisted infrequently by her sister, who volunteers her time.(R.42(a)).

Ms. McGinnis presented as an exhibit

to the Zoning Hearing Board her business tax return, showing that the house is being depreciated and that the expenses of her running the residential home are being taken as business expenses.

All of the witnesses and residents testified that the residence was a home and most of the senior citizens believed that they had some sort of tenuous familial relationship with Ms. McGinnis. There is only one kitchen with single cooking facilities, the residents eat together, share all common areas and live communally.

The residents, with the exception of James McGinnis, testified that they came to stay with Ms. McGinnis after having heard of her by word of mouth; there is no sign, no advertising, no business listing nor any other activity testified to whereby Ms. McGinnis holds herself out to the public as running a residential

home for senior citizens. In her testimony before the Zoning Hearing Board, Ms. McGinnis raised the issue of the harmful and possibly fatal effects an adverse decision and forced closing of her residential home would have on the elderly residents.

On June 11, 1980, the Langhorne Manor Borough Zoning Hearing Board rendered its decision. (Appendix A)

McGinnis appealed to the Court of Common Pleas of Bucks County raising the same issues that were presented to the Zoning Hearing Board. The Borough of Langhorne Manor intervened as Appellees in support of the decision of the Zoning Hearing Board. No additional testimony was presented to the Court. The Court, by the Honorable Edward G. Biester, Jr., entered an order sustaining the appeal of Theresa McGinnis on the basis that the Zoning Ordinance of Langhorne Manor Borough

was unconstitutional as specifically applied to the McGinnis property. The Court denied the request for a variance and found that the use did not fit within the definition of family pursuant to the Langhorne Manor Borough Zoning Ordinance. The Court did not decide whether the Zoning Ordinance was unconstitutional in general. Judge Biester wrote the opinion for the Court on behalf of the panel consisting of Judges William Hart Rufe, III, Harriet M. Mims and Edward G. Biester, Jr. (Appendix B)

The Borough of Langhorne Manor appealed to the Commonwealth Court and Ms. McGinnis filed a Cross-Appeal in order to preserve the issues of permissive use, variance and unconstitutionality in general.

On July 29, 1982, the Commonwealth Court rendered its decision reversing the Court of Common Pleas' decision that the

Zoning Ordinance was unconstitutional as applied to Ms. McGinnis' use and affirming the Court of Common Pleas of Bucks County's refusal of a variance; there was no decision concerning the issues of unconstitutionality in general and of permissive use (Appendix C).

In the initial presentation before the Zoning Hearing Board, the issues of whether the zoning ordinance could constitutionally prohibit a family-like living arrangement was raised and that any restriction should be to use rather than users. The right of the occupants to freedom of association and travel was also raised at that time. These issues were preserved on appeal before the Court of Common Pleas of Bucks County, the Commonwealth Court and the Supreme Court of Pennsylvania.

The issue of the deleterious effect upon the residents of their being forced to move was first raised by Ms. McGinnis

in her testimony before the Zoning Hearing Board (R.296a) as well as by one of the residents (R.85a). It was part of the argument presented at every court level and was part of the reproduced record for the Commonwealth Court.

A copy of the questions presented to the Supreme Court of Pennsylvania is set forth in Appendix E. The Borough argued in its brief to the Supreme Court of Pennsylvania that these rights could not have been raised by the residents unless they were parties and that they therefore have no standing. This issue was raised by Ms. McGinnis on behalf of the elderly residents; the question of her standing to assert their rights has never been raised by Langhorne Manor Borough.

The specific issue of whether it is a violation of equal protection to hold that the functional equivalent of a

biological family is limited to parent and child did not arise until the Commonwealth Court rendered its decision. It was raised before the Pennsylvania Supreme Court.

Petitioner filed a Petition for Allowance of Appeal on August 30, 1982 to the Supreme Court of Pennsylvania. On December 28, 1982, by letter-Opinion, the Supreme Court of Pennsylvania denied Petitioner's Petition for Allowance of Appeal. Petitioner now seeks certiorari from this Court.

I. THIS COURT SHOULD ISSUE A WRIT OF CERTIORARI BECAUSE THIS CASE PRESENTS AN IMPORTANT UNSETTLED CONSTITUTIONAL QUESTION WHICH HAS BEEN DECIDED DIFFERENTLY BY STATE COURTS.

A. GROUPS OF UNRELATED INDIVIDUALS WHO CREATE A FAMILY IN A RESIDENTIAL SINGLE-FAMILY ZONING DISTRICT ARE ENTITLED TO CONSTITUTIONAL PROTECTION AND A HEIGHTENED LEVEL OF SCRUTINY

In recent years this Court has decided two cases which involved the interpretation of ordinances similar to that of Langhorne Manor Borough.

In Village of Belle Terre v. Boraas 416, U.S. 1, 94 S. Ct. 1536, 39 L. Ed. 2d 797 (1974), the zoning ordinance defined a "family" as follows:

> "One or more persons related by blood, adoption or marriage, living and cooking together as a single housekeeping unit exclusive of household servants. A number of persons but not exceeding two (2) living and cooking together as a single housekeeping unit though not related by blood, adoption, or marriage shall be deemed to constitute a family." 416 U.S. at 3.

The Village of Belle Terre had restricted land use to one family dwellings excluding lodging houses, boarding houses, fraternity houses, or multiple-dwelling houses. The village sought to apply the zoning ordinance to six unrelated college students sharing a single dwelling. The students and the landlord challenged the constitutionality of the ordinance as violative of equal protection and rights of association, travel and privacy. The court found that no fundamental rights of the students had been violated and held that the challenged statute withstood equal protection scrutiny since it bore a rational relationship to a permissible state objective.

In Moore v. City of East Cleveland, Ohio, 431 U.S. 494, 97 S. Ct. 1932, 52 L. Ed 2d 531 (1977), this Court invalidated a zoning ordinance which defined "family" so narrowly as to exclude

certain blood relatives of the head of household[1]. The city relying on Belle Terre, (supra), enforced the ordinance against Inez Moore who lived with her son and two grandsons who were first cousins.

---

[1] Section 1341.08 (1966) provides:

"'Family' means a number of individuals related to the nominal head of the household or to the spouse of the nominal head of the household living as a single housekeeping unit in a single dwelling unit, but limited to the following:

"(a) Husband or wife of the nominal head of the household.

"(b) Unmarried children of the nominal head of the household or of the spouse of the nominal head of the household, provided, however, that such unmarried children have no children residing with them.

"(c) Father or mother of the nominal head of the household or of the spouse of the nominal head of the household.

"(d) Notwithstanding the providions of subsection (b) hereof, a family may include not more than one dependent married or unmarried child of the nominal head of the household or of the spouse of the nominal head of the household and the spouse and dependent children of such dependent child. For the purpose of this subsection, a dependent person is one who has more than fifty percent of his total support furnished for him by the nominal head of the household and the spouse of the nominal head of the household.

"(e)A Family may consist of one individual."

The Court, per Mr. Justice Powell writing for a plurality, concluded that the ordinance was unconstitutional as violative of substantive due process. "When government intrudes on choices concerning family living arrangements, this court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation." 431 U.S. at 499. This Court then found that, since the ordinance in question placed no numerical limitation on nuclear families and the municipality could show no important governmental interest which could be advanced only by limiting extended families, the ordinance could not be upheld.

The results in these two cases may be distinguished by the level of scrutiny applied. When a municipality applies statutes like the one in question to unrelated individuals without family bonding,

a rational relationship test is appropriate. When a statute is aimed at related individuals, strict scrutiny is appropriate. What level of scrutiny is appropriate for a group of unrelated elderly individuals who have banded together to form a spiritual family to care for each other's emotional and physical needs? What protection from state interference is accorded these citizens by the constitution? This case squarely presents this court with an opportunity to address this important unsettled question. It is suggested that an intermediate level of scrutiny be applied such as has been applied in cases involving classification based on sex.[2]

This heightened scrutiny may be appropriate because of the special needs of the elderly but the basic argument being made here is that it is appropriate because the constitutional protection of the "sanctity of the family" described

---

[2] Even without heightened scrutiny, the ordinance is overinclusive, underinclusive and bears no rational relationship to an objectiv of preserving family life.

in Moore should extend to the creation of a family where no biological ties exist; such protection is already being accorded by state law to those who function as a family unit. The California Supreme Court, for example, has suggested the right to privacy[3] includes the right of persons to make intimate life style decisions free from unnecessary government interference, i.e. to become the functional equivalent of a family. City of Santa Barbara v. Adamson, 27 Cal. 3d 123, 610 P.2d 436 (1980). The court concluded that generally zoning ordinances are much less suspect when they focus on the use than when they command inquiry into who are the users.

---

[3] The court suggested two possible factors to aid in a determination of whether a group shares the characteristics of a family and thus is protected under the right to privacy. The first is whether the group is a close group with social, economic and psychological commitments to each other and the second whether emotional support and stability are provided by the members to each other. The more closely the values pursued resemble those of a traditional family, the more likely the decision to live together will be protected by the right to privacy.

In McGinnis, the overinclusive and underinclusive nature of the zoning ordinance was ignored and Belle Terre found controlling. The Court asserted that "no persuasive reason has been offered why a municipality may, as a legitimate exercise of its police power, prohibit six college students from residing together but may not constitutionally prohibit cohabitation of six unrelated older persons". 448 A.2d at 112

This simplistic approach ignores the basic and crucial differences between the two situations. In Belle Terre, (supra) Mr. Justice Douglas writing for the majority, found that the statute in question bore a rational relationship to a permissible state goal since "(A) quiet place where yards are wide, people few and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs...It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a

sanctuary for people." 416 U.S. at 9. While the presence of six transient college students living together for convenience and without desire for family living or permanence of residency is inimical to these goals, the same rationale should not be applied to exclude six elderly individuals whose only desire is to live the remainder of their lives in the community, comforted by the support and dignity of their chosen family.

Many of these same arguments were made to this Court in Belle Terre (supra) based upon the right to privacy and the freedom of association but the focus of these arguments was that the ordinance in question was unconstitutional because it interfered with a lifestyle choice as to household companions. There was no express or implied aim on the part of the Belle Terre tenants to recreate a

family but merely to maintain a life style which did not match the rest of the community, a transient tenancy based solely upon economic expediency. In the instant case, the McGinnis lifestyle is obviously an attempt to mirror the community and participate in its life; it is the very values of the community and the glorification of family living of which these elderly residents wish to partake. To provide a home environment was the reason why Ms. McGinnis purchased the subject property rather than a nearby property which had previously been converted into a nursing home and in which the residents would be confined to an upper floor. (R.297a)

In the state court decisions since Belle Terre (supra) and Moore (supra), the focus of the courts has been on the nature of a family rather than upon the particular relationships of the people

involved and, where a use is determined to have the characteristics of a family, the occupancy is so considered even where no biological relationship exists and despite the existence of financial overtones.

City of Santa Barbara v. Adamson, 27 Cal. 3d, 123 , 610 P.2d 436,164 Cal. Rptr. 539 (1980) involved a zoning ordinance which defined a "family" as, inter alia, "(A) group not to exceed five (5) persons, excluding servants, living together as a single housekeeping unit in a dwelling unit". The city of Santa Barbara sought to enforce this statute against a group of twelve adults living together in a single dwelling. The California Supreme Court characterized this group as an alternate family". 164 Cal.Rptr. at 541. Although this case was decided exclusively on state constitutional grounds, in determining that

an "alternate family" existed, the court noted that the group had "social, economic, and psychological commitments to each other"... shared expenses, rotated chores...and ate evening meals together". 164 Cal. Rptr. at 541. It is likewise interesting to note that the Adamson court questioned in a footnote whether Belle Terre, (supra), still enunciated federal law. 164 Cal. Rptr. at 543.

In City of Des Plaines v. Trotter, 34 Ill. 2d 432, 516 N.E. 2d 116 (1966), the Ill. Supreme Court faced a challenge to a single family zoning ordinance by a group of four unrelated young men who occupied a dwelling and operated a single housekeeping unit and refused to extend the authority to zone to an ordinance that penetrated "so deeply... into the internal composition of a single housekeeping unit". Id., at 438, 216 N.E. 2d at 120.

The New York Court of Appeals has reached a similar conclusion. "As long as a group bears the generic character of a family unit as a relatively permanent household it should be equally entitled to occupy a single family dwelling as its biologically related neighbors". City of White Plains v. Ferraioli, 34 N.Y. 2d 300, 306, 357 N.Y. S. 2d 449, 313 N.E. 2d 756 (1974).

In accord: Berger v. State 71 N.J. 206, 364 A.2d 993 (1976), State ex rel Region II Child and Family Services v. District Court of the Eighth Judicial Circuit, __Mont.__, 609 P.2d 245 (1980); Neptune Park Association v. Steinberg, 138 Conn. 357, 84 A.2d 687 (1951). In Township of Pemberton v. State of New Jersey, 178 N.J. Super 346, 429 A2d 360 (1981), the Superior Court of New Jersey held that a group home for

preadolescent boys which wished to create a normal family environment was a family housekeeping unit under a residential ordinance. Basing its decision on state constitutional grounds, the Court explained its reasoning as follows:

> "We are further persuaded that the law of this state prohibits a municipality from enacting a zoning ordinance which distinguishes, in the context of permitted uses, between a blood-related family unit and a similarly-sized group of people who are unrelated but who function together as a family unit." 429 A.2d at 364.

It is therefore submitted that the Belle Terre holding should be limited to the situation it considered, that it should not be held up as a straitjacket wherever unrelated persons try to live together, no matter what lifestyle these persons are creating and that the clear light of the reality of the times in which we live with the alternate living arrangements required should be allowed

to shine forth, illuminating even those residential communities in which the elderly, retarded or troubled wish to enjoy family living along with their more fortunate brethren who already have such a lifestyle.

B. THE MEANS BY WHICH A FAMILY LIVING ARRANGEMENT IS MADE FINANCIALLY FEASIBLE ARE NOT DETERMINATIVE OF WHETHER IT CONSTITUTES A FAMILY FOR ZONING PURPOSES.

Even in the Pennsylvania cases which have considered the issue of whether group homes may lawfully exist in single-family residential zoning districts, the distinction which the courts have made has always been based upon the presence of factors which predicate the basic use as familial or institutional in nature.

The means by which the group living is made financially feasible should be considered at most one of these factors

rather than a conclusive determinant of the issue. The Langhorne Manor Borough Zoning Ordinance in question employs the undefined term "non-profit" as part of its definition of family; however, this does not bar leasing a residence or the payment of money by a blood relative to another in order to live in the household. Langhorne Manor Borough has been arguing that "non-profit" means "commercial"[4]. Certainly there have been similar indicia present either expressly or by implication in those group homes which have been permitted in Pennsylvania and elsewhere.

The Supreme Court of Pennsylvania has

---

[4] Langhorne Manor Borough bootstraps its argument by referring to commercial indicia in a previously run business of Ms. McGinnis in another municipality; none of these commercial indicia have been attributed to the residence in Langhorne Manor Borough.

refused to allow this appeal from the decision of the Commonwealth Court and has never directly addressed the issue of whether a family use can exist within a framework which is not "non-profit", whatever the term is ultimately determined to mean. The courts of last resort of other jurisdictions have considered this issue and have reached the same conclusion as that of the panel of Bucks County Court of Common Pleas judges who decided the ordinance in question was unconstitutional as applied:

> "One aspect of the situation which troubled the Zoning Hearing Board was the profit nature of the arrangement established by appellant. We do not believe that the manner in which the arrangement is made financially feasible controls the resolution of the case. It is the nature of the use and its character and its potential for adverse impact or non-potential for adverse impace upon the residential character of the neighborhood which must be analyzed, rather than

> the means by which the arrangement has been made economically possible. We note that in Hopkins,... one of the users of the subject property worked as a full-time houseparent and was paid to do so. The fact that she was paid by a non-profit corporation does not mean that for her the operation did not involve compensation in money just as any profit realized by Ms. McGinnis would involve compensation for her efforts, and as any support payments made to the users in Children's Home of Easton, ... were money compensation." McGinnis v. Langhorne Manor Borough Zoning Hearing Board, 36 Bucks Co. L.R. 115, 119 (1981) citing Hopkins v. Zoning Hearing Board of Abington Township, __Pa.Cmwlth. Ct.__, 423 A.2d 1082 (1980) and Children's Home of Easton v. City of Easton, __Pa. Cmwlth. Ct.__417 A.2d 830 (1980).

In Costley v. Caromin House, __Minn.__, 313 N.W. 2d 21 (Minn. 1981), neighbors sought to enjoin the construction of a group home for retarded children, citing a putative violation of the city's single family zoning ordinance. In discussing

the for-profit status of the proposed home, the court noted, "That (the group home) is paid for its efforts does not detract from the essential character of its program of non-institutional living for the retarded. Clearly, the receipt of money to support the care of more or less permanent residents is incidential to the scope of (its) efforts". 313 N.W. 2d at 26. In accord: Crowley v. Knapp, 94 Wis 2d 42, 288 N.W. 2d 815 (1980).

Although it is either ignored or glossed over in many of the cases in which group living is permitted, financial dealings are obviously a part of these arrangements although not the primary purpose of the lifestyle. Foster parents are paid for care of foster children, houseparents are paid for care of the retarded--the financial realities do not destroy the fact that families are being created, lives intertwined and love shared.

II. THIS COURT SHOULD GRANT CERTIORARI BECAUSE CONSTITUTIONAL RIGHTS OF ADULTS, ESPECIALLY ELDERLY ADULTS, TO EQUAL PROTECTION ARE ADVERSELY AFFECTED BY THE DECISION OF THE COMMONWEALTH COURT OF PENNSYLVANIA[5], WHICH CONSTITUTIONAL RIGHTS HAVE NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT.

In the cases which have been before the Commonwealth Court which involve non-related persons living together, the distinction made by the Court was whether the persons involved would live as a family. Where there were numbers of supervisory personnel, an intention of transient residency, regulations from outside persons or groups, court supervision, the appearance and use of the residence as an institution, it was determined that

---

5 The Commonwealth Court of Pennsylvania Decision is the last written opinion in this matter. Appeals to the Pennsylvania Supreme Court from the Commonwealth Court are by Petition for Allowance of Appeal, not as of right; the Supreme Court denied the Petition for this appeal.

the institutional aspects dominated and the use was not familial. Pennsylvania George Junior Republic v. Zoning Hearing Board of Cool Springs Township, 37 Pa. Cmwlth. Ct. 151, 389 A.2d 261 (1978). Wengert v. Zoning Hearing Board of Upper Merion, 51 Pa. Cmwlth. Ct. 79, 414 A.2d 148 (1980). Lakeside Youth Service v. Zoning Hearing Board of Upper Moreland Township, 51 Cmwlth. Ct. 485, 414 A.2d 1115 (1980).

In those cases in which the Commonwealth Court found unrelated persons to be living as a family, the test applied by the Court was whether the lifestyle was the functional equivalent of a biological family. Children's Home of Easton v. City of Easton, __Pa. Cmwlth. Ct. __, 417 A. 2d 830 (1980). Hopkins v. Zoning Hearing Board of Abington Township, __ Pa. Cmwlth. Ct. __ 423 A.2d 1082 (1980). In each of these cases, Village of Belle

Terre v. Boraas, 416 U.S. 1 (1974), was distinguished although the "families" did not fit within the definition of the ordinances in question.

In comparing the McGinnis situation to the above two lines of cases, it is easy to see that McGinnis falls in the Easton-Hopkins category. Ms. McGinnis lives in the dwelling in question with her elderly residents, assisted only by her retired sister Mary, who voluntarily and infrequently provides her time. The elderly residents wish to live with Ms. McGinnis permanently. There are no support personnel nor have the residents been placed in the home by the Court. The home has the appearance and use of a normal home and the residents have access to all common areas. Even more poignantly, the residents testified that they felt like a family and some considered themselves to be related to Ms. McGinnis even

though the actual degree of relationship was either nonexistent of impossible to ascertain.

The Commonwealth Court is saying that the functional equivalent of a biological family must consist of parents and children.

It is denial of equal protection to hold that single-family residential zoning permits the "functional equivalent of a biological family" while limiting that "equivalent" to parent and dependent child. The "sanctity of the family" championed in Moore, (supra) should extend to those who are adults unfortunate enough to lack or be unable to live with biological relatives but desirous of and needing to recreate a family for themselves with a lifestyle which in all pertinent aspects imitates that of their neighbors.

That the Commonwealth Court's view is also shortsighted and irrational may be shown by two arguments. In Hopkins, (supra), the state regulations cited had as their purpose the placement of persons disabled by mental retardation into a family setting as nearly normal as possible and into the mainstream of society. The question before the Court was whether retarded children living with house parents acted as a family unit and, in so finding, the Court held that the definition of a family in the Abington Township Zoning Ordinance was constitutionally invalid as applied to the Hopkins situation. The Court did not deal with the question of whether these mentally retarded children would still be considered part of this

same family when they chronologically became adults. These persons would have the same needs but would still be unrelated to the house parents by blood, adoption or marriage. Therefore, it should make no difference whether these retarded persons are children or adults for the purposes of creating and existing as part of a family setting which of course was the aim of the program developed by the Commonwealth of Pennsylvania.

More importantly, the distinction made between these elderly persons and the foster children in the Easton case (supra), is one which is constitutionally suspect. Certainly, many of the needs for nurturing and care are the same for these two groups and there is no doubt that the concept of foster parents is

equivalent to the concept of foster children. Moreover, the number of foster children which may exist as a family is limited by the same familial characteristics as the number of foster parents. After some number, the group would lose its characteristics as a family, but so long as the number is not reached, certainly the elderly may be viewed as "foster parents" and receive the same emotional support and care in a family setting as do foster children. In both cases, there may exist relatives in whose homes the foster children or the elderly have no place.

The testimony shows that the elderly persons intended their residency to be permanent. The fact that a resident is free to leave at any time is indicative not of less of a commitment to remain at the home but the fact that the residents are legally

adults. Certainly, most of them testified as to their inability to live alone, the degree of supervision or care necessary and their bonds to the living experience at the McGinnis home. Thus, there were social and moral bonds created just as there are for foster children who also may be reclaimed by their natural parents. The bonds created by a commitment to child rearing mentioned by the Commonwealth Court are the bonds of the caretaker and not the bonds of the residents whether the residents be foster children or senior citizens. No one reading this record can deny that Ms. McGinnis has a commitment to the care, emotional and mental health of the elderly residents which commitment is far beyond that of a professional for a patient.

A Zoning Hearing Board may constitutionally prohibit six college students

from residing together in a single family zone when it is found that they have no intention of promoting family values and living a family lifestyle but may not constitutionally prohibit the cohabitation of six unrelated elderly persons when (1) these persons are living a family lifestyle and (2) the only significant distinction between their lifestyle and that permitted by the Commonwealth Court is that they are adults and the others are children. It is constitutionally impermissible to state that the only equivalent of a biological family is parent and unrelated child and not a person acting in a parental capacity to an unrelated adult who needs supervisory care. To state otherwise is to confine such elderly to institutional care in institutional districts and tell them that they have outlived their capacity for,and entitlement to,

family life.

III. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE ELDERLY RESIDENTS OF THE McGINNIS HOME HAVE A CONSTITUTIONAL RIGHT TO DUE PROCESS BEFORE A DECISION IS MADE THAT WILL REQUIRE THEM TO LEAVE THEIR HOMES.

Ms. McGinnis testified before the Zoning Hearing Board of the deleterious effect which she believed would result from the elderly residents being forced to leave. This phenomenon, called "transfer trauma" has recently been recognized by the courts as causing irreparable emotional and physical deterioration and increased incidence of mortality in the elderly and inform. Klein v. Mathews, 430 F. Supp 1005 (D.N.J. 1978); Burchette v. Dumpson, 387 F. Supp 812 (E.D.N.Y. 1974). Brede v. Director for Department of Health, 616 F. 2d 407, 412 (9th Cir. 1980); Yaretsky v. Blum, 629 F. 2d 817, 821 (2d Cir. 1980), reversed on other grounds,

___U.S.___, 102 S. Ct. 2777 (1982); Bumpus v. Clark, 681 F. 2d 679 (1982). "The basic principle of the phenomenon is the recognition that the transfer of geriatric patients to any unfamiliar surrounding produces an increased rate of morbidity and mortality." Bracco v. Lackner, 462 F. Supp. 436, 445 (N.D. Cal. 1978).

In Yaretsky (supra), medicaid patients were held to be entitled to due process when these patients were transferred from lower level care to higher level care because of the patient's constitutionally protected liberty interest in avoiding the effects of "transfer trauma". 629 F.2d at 821.

As the Ninth Circuit Court of Appeals held in Brede, "to the extent... that transfer trauma is a possible result of the state's decision to relocate the Hale Mohalu patients, relocation may

constitute a deprivation cognizable under the due process clause"; on this basis, the case was remanded for further proceedings to determine if the requirements of due process had been satisfied. 616 F. 2d at 412.

In the instant case, it is clear that state action, if used to make Ms. McGinnis cease to use her home as a family residence for these elderly people, will impinge upon the liberty interest of these people to avoid danger to their own health and lives. There has been no effort made by the municipality to protect the constitutional right of these elderly persons to be free from transfer trauma. This issue, even when raised by Ms. McGinnis, was ignored by the Zoning Hearing Board as were those parts of the testimony by the elderly residents as to their fears of having to go elsewhere.

That a person such as Ms. McGinnis would have standing to raise the issue of "transfer trauma" on behalf of the elderly residents has been determined. Ms. McGinnis is sufficiently within the zone of this protected interest to invoke judicial review. Certainly, if the rights of the residents to be protected where transfer trauma is involved are violated and the residents must move, Ms. McGinnis is also injured; however, her standing is also based upon her relationship to these elderly persons. Cf. Sierra Club v. Morton, 405 U.S. 737, 92 S. Ct. 1361, 31 L.Ed. 2d 636 (1972) (org. permitted to assert rights of affected members without showing any impact on organization itself); Village of Belle Terre (supra) (interest of landlord in rental values as affected by permissible occupancy limits providing standing as to rights of prospective

tenants); Doe v. Bolton, 410 U.S. 179, 93 S. Ct. 739, 35 L. Ed 2d 201 (1973) (physicians allowed standing to challenge abortion statutes on behalf of pregnant women because of impact on their profession)

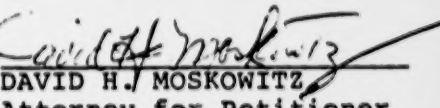
No determination has been made as to what due process is required in this situation.

CONCLUSION

Petitioner Theresa McGinnis requests this Honorable Court to grant a Writ of Certiorari to review this case because the constitutional right of a group of unrelated individuals to create a family in a single-family residential zoning district has been decided differently by state courts and the financial means by which the arrangement is made possible should not preclude its being considered familial because a decision which holds that adults and, particularly the elderly, cannot form a living arrangement which is the functional equivalent of a biological family violates the equal protection clause of the Fourteenth Amendment to the Constitution of the United States; and, lastly, because the elderly residents of the McGinnis home have a constitutional

right to due process before a decision is made that will require them to leave their home.

Respectfully submitted,

BY: 

DAVID H. MOSKOWITZ
Attorney for Petitioner

LANGHORNE MANOR BOROUGH ZONING
HEARING BOARD

Application of Theresa McGinnis

I. FINDINGS OF FACT

1. The Langhorne Manor Borough Zoning Hearing Board held hearings on the within application on December 20, 1979; January 9, 1980; January 30, 1980 and March 26, 1980, which hearings were continued by adjournment to a date certain.

2. The final hearing on the above application was held on April 2, 1980.

3. By written agreement of the parties of record, the date for which a decision must be handed down by this Board was extended, in writing, to June 13, 1980.

4. The premises which is the subject of this application is located at 401 Station Avenue, and was purchased by the applicant/appellant, Theresa McGinnis,

in June of 1979.

5. The subject property is zoned R.A. RESIDENTIAL DISTRICT.

6. Theresa McGinnis is a nurse and is experienced in the operation of residential homes for the care of the aged.

7. Shortly after purchasing the subject property at 401 Station Avenue, Theresa McGinnis commenced use of the property as a commercial operation for the residential care of the aged.

8. Theresa McGinnis holds herself out to the public as offering a commercial service by providing residential care of the aged.

9. Theresa McGinnis has established a pattern of charges and regular fees for such services and the same has continued.

10. The operation of a residential home for the aged at 401 Station Avenue is commercial in nature and is a service operated for profit as shown by Schedule "C"

of the 1979 Federal Income Tax Return of Theresa McGinnis.

11. Langhorne Manor Borough sent notices of possible zoning violations shortly after applicant purchased the subject property and on October 10, 1979, the Zoning Officer of the Borough cited Theresa McGinnis for failure to comply with the use regulations in the R.A. District.

12. The immediate area of Langhorne Manor in which the subject property is located is exclusively residential.

13. The proposed use of the property as a residential home for the elderly is opposed by a number of neighbors who cited primarily traffic and potential sewer problems.

14. The property in question is well suited as a private single family residence and could have been sold as such at the time Theresa McGinnis purchased the pro-

perty. In fact, an offer to purchase the same property for a higher sum was refused by the seller.

15. Residing at 401 Station Avenue beside the applicant, Theresa McGinnis, is her uncle and five (5) other individuals with no clear evidence establishing a specific family relationship with the applicant.

II. CONCLUSIONS OF LAW

1. The present and proposed use of 401 Station Avenue by Theresa McGinnis is not permitted as a matter of right in the R.A. Zoning District in Langhorne Manor Borough.

2. The present and proposed use of 401 Station Avenue as a residential home for the elderly is not permitted as a single family dwelling use as defined by the Langhorne Manor Borough Zoning Ordinance.

3. Other than her uncle, the

individuals residing with Theresa McGinnis are not "family" in the traditional sense and within the first definition of the same found in Section 215 of the Langhorne Manor Borough Zoning Ordinance.

4. The present and proposed use of 401 Station Avenue as a residential home for the elderly is not "a single non-profit dwelling unit"; to the contrary, it is a commercial operation for profit and therefore the individuals residing with the owner/applicant are not "family" within the second and broader definition found in Section 215 of the Langhorne Manor Borough Zoning Ordinance.

5. The individuals residing with the owner/applicant at 401 Station Avenue are not "maintaining a common household," but rather are paying fixed fees and charges constituting a commercial dwelling operated for profit; therefore, they are not "family" and the use of the property

is not as a single family dwelling unit.

6. Theresa McGinnis has not proved the necessary legal factors which would entitle her to a variance in that no physical conditions peculiar to the particular property cause the unnecessary hardship which is a pre-requisite to a variance.

7. That the unnecessary hardship which was shown and established was both self created by the property owner and was not peculiar to the particular property resulting from the physical circumstances of the property.

8. The property located at 401 Station Avenue can be fully and reasonably used as a singly family residential dwelling in strict conformity with the requirements of the R.A. Zoning District.

9. Theresa McGinnis has not proved that the Langhorne Manor Borough Zoning Ordinance is unconstitutional either in

general or as applied to her.

10. The application of the Langhorne Manor Borough Zoning Ordinance to the applicant and her property does not violate due process of law nor does it violate the Equal Protection Clause of the United States Constitution.

11. The present proposed use of 401 Station Avenue as a residential home for the elderly is prohibited by the Zoning Ordinance of Langhorne Manor Borough which has not been preempted by other laws or regulations of the Commonwealth of Pennsylvania.

III. DECISION

AND NOW, this 11th day of June, 1980, upon consideration of the foregoing Findings of Fact and Conclusions of Law, it is the decision of the Langhorne Manor Borough Zoning Hearing Board that:

1. The present and proposed use of 401 Station Avenue as a residential home

for the elderly is prohibited by the Zoning Ordinance of Langhorne Manor Borough and should immediately cease.

2. The appeal to this Zoning Hearing Board from the actions and orders of the Zoning Officer is denied.

3. The application of Theresa McGinnis for a variance for use of this property as a residential home for the elderly is denied.

4. The Zoning Ordinance of Langhorne Manor Borough is Constitutional in general and as specifically applied to this property and this application.

5. The application/appeal of Theresa McGinnis is hereby denied and dismissed.

/s/ Charles E.Light

LANGHORNE MANOR BOROUGH
ZONING HEARING BOARD

/s/ Larry A. Brossman
Larry Brossman, Chairman

/s/ Charles E. Light
Charles Light

/s/ Dr. Frank DiMoia
Dr. Frank DiMois

DECISION OF THE COURT OF COMMON PLEAS OF BUCKS COUNTY
DATED MARCH 24, 1981

IN THE COURT OF COMMON PLEAS OF BUCKS COUNTY
CIVIL

IN RE:

APPEAL OF THERESA McGINNIS FROM THE DECISION OF THE LANGHORNE MANOR BOROUGH ZONING HEARING BOARD	:	No. 80-7453-14

BEFORE: RUFE, MIMS, BIESTER, JJ.

OPINION AND ORDER

This appeal was argued before the Court en banc. Theresa McGinnis, appellant, is the owner of the house and land located at 401 Station Avenue, Langhorne Manor Borough, Bucks County, Pennsylvania. She appeals the decision of the Zoning Hearing Board of Langhorne Manor Borough dated June 11, 1980. This decision of the Board denied a variance request by the appellant and also found the zoning ordinance of Langhorne Manor Borough constitutional, generally and as

specifically applied to the appellant.

Theresa McGinnis purchased the subject property in June of 1979. The property is and was zoned R.A., single-family residential. Prior to its purchase, its previous use had been as a physician's residence with attached medical offices. The testimony established that the residence in question is a very large English Tudor with three floors, not including the attic and cellar. The house is currently in very good repair, having had extensive work done in it since being purchased by Ms. McGinnis.

The first floor of the house contains all the usual rooms present in a large private residence. It also includes a patio, an enclosed porch, a laundry and a sitting room. The former medical offices consist of three additional rooms.

The second floor of the house contains

five bedrooms, a converted sitting room and three full baths. The house has been equipped with an electric eye garage, a mechanical chair for access to the second floor, and a comprehensive smoke alarm system. In this large, well maintained, and apparently comfortable home reside appellant, Ms. McGinnis and six adults, ranging in age from 72 to 95.

Ms. McGinnis has a B.S. and an M.A. in nursing. Over the years she has been employed both as a private duty nurse and as an administrator in hospitals and nursing homes. Ms. McGinnis is presently not employed in any capacity outside of her home. Her present vocation appears to be that of providing a family-like environment for the six senior citizens who live with her. All these individuals are ambulatory, continent, and capable, in varying degrees, of taking care of most of their own physical needs. They

dress and feed themselves. Appellant supervises their medical and their diet. Meals are prepared by the appellant, but she is assisted in this task by the elderly household members. She testified that she takes the elderly residents for automobile rides, weather permitting, and drives the ladies to their hairdressers when necessary. These residents are assigned small chores, each according to his or her ability. The household includes a canary and a French poodle and the residents participate in their care and feeding.

The residents uniformly testified that they were very satisfied with their present living arrangements. They felt they were part of a family at 401 Station Avenue, and indicated a wish to remain so. It is pertinent to note that some residents had, in the past, lived with their own families, but for various

reasons were no longer able to do so. A few residents had been in and out of nursing homes while others had been living alone in apartments.

Ms. McGinnis refused to divulge exactly what fee arrangements were made with each household member. It appears, however, that individuals were charged according to what they and their families could afford. Testimony revealed on two occasions that payment was between $400. and $500. monthly and that such payment consisted of social security plus additional fees paid by relatives of the residents. Ms. McGinnis also appeared less than candid when discussing her own familial relationship with the residents. She was able credibly to establish only one gentleman as a blood relative, that being her uncle James McGinnis. Neither Ms. McGinnis nor the other five individual residents were able to establish even

remote relationships to each other. Ms. McGinnis did not always make a satisfactory witness and her attitude was sometimes evasive and sometimes flinty.

As previously noted, the appellant's property is zoned R.A. single-family residential. Section 215 of the Langhorne Manor Borough Zoning Ordinance defines family as follows:

> "One or more persons related by blood, marriage, or adoption, and in addition, any domestic servants or gratuitous guests therof; of a group of not more than five persons who need not be so related, and in addition, domestic servants or gratuitous guests thereof, who are living together in a single non-profit dwelling unti and maintaining a common household with single cooking facilities. A roomer, boarder or lodger shall not be considered a member of the family."

On October 10, 1979 appellant was cited for failure to comply with the zoning ordinance. She then appealed from the issuance of the citation to the Zoning

Hearing Board of Langhorne Manor Borough and, simultaneously, requested a variance from the use regulations of the R.A. district, or, in the alternative, a determination that the Borough Zoning was unconstitutional in general or as applied to appellant's property.

Hearings were held on December 9, 1979, January 9, January 30, March 6 and April 2, 1980. On June 11, 1980, Langhorne Manor Borough Zoning Hearing Board rendered its decision. The Board held that the present and proposed use of 401 Station Avenue as a residential home for the elderly was prohibited by the zoning ordinance and should therefore immediately cease. Further, the application of Ms. McGinnis for a variance for use of said property as a residential home for the elderly was denied. Finally, the zoning ordinance of Langhorne Manor Borough was held

constitutional in general and as specifically applied to this property. Ms. McGinnis appeals to this Court from the decision of the Board.

The scope of review in a zoning appeal where the court has not heard additional evidence is limited to whether the zoning board has committed a manifest abuse of discretion of error of law. Upper Leacock Township Supervisors v. Zoning Hearing Board, 481 Pa. 479, 393 A.2d 5 (1978); Pyzdrowski v. Pittsburgh Board of Adjustment, 437 Pa. 481, 263 A. 2d 426 (1970); Salisbury v. Rummel, 44 Pa. Commonwealth Ct. 581, 406 A.2d 808 (1979); Kauffman v. Doylestown Township Zoning Hearing Board, 34 Bucks Co. L. Rep. 345 (1980).

This Court must consider three issues. First, whether Ms. McGinnis and the residents of 401 Station Avenue fit within the definition of family pursuant to the

Langhorne Manor Borough zoning ordinance; second, whether Ms. McGinnis is entitled to a variance and third, whether the zoning ordinance in question is unconstitutional as applied to the instant and proposed use of the McGinnis property.

Clearly, the Zoning Hearing Board of Langhorne Manor Borough committed neither a manifest abuse of discretion nor error of law in regard to the first two issues outlined above. Substantial evidence supports the Board's conclusion that the residents at 401 Station Avenue are not "family" within the scope of the alternate definitions given in §215 of the zoning ordinance. Further, appellant did not establish her entitlement to a variance. Variances should be granted only sparingly and under exceptional circumstances. Jones v. Lower Makefield Township Zoning Hearing Board, 23 Bucks

Co. L. Rep. 14 (1975). The property is not subject to unique physical circumstances nor is appellant deprived of all productive use of her property, Swift v. Zoning Hearing Board of East Hempfield, 20 Pa. Commonwealth Ct. 87, 340 A.2d 592 (1975). Personal and economic hardship alone is not sufficient to support a variance, Borough of Latrobe v. Sweeney, 17 Pa. Commonwealth Ct. 356, 331 A.2d 925 (1975). Further, it is clear appellant was aware at the time of purchase, of the zoning classification of the subject property. Therefore, the remaining issue to be considered by this Court is the constitutionality of the zoning ordinance as it is applied to the instant use.

This case draws into focus a very troubling set of land use questions and apparently conflicting concerns over the quality of family life and the

enhancement of family values in residential neighborhoods.

On the one hand, Langhorne Manor Borough has very appropriately expressed its interest in establishing single-family residential neighborhoods and preserving their integrity. On the other hand, the appellant is striving to establish for elderly persons in danger of institutionalization a setting which most nearly approximates traditional familial living arrangements.

The resolution of this case is controlled by two very recent Commonwealth Court decisions. Children's Home of Easton v. City of Easton, __Pa. Commonwealth Ct. __ 417 A.2d 830 (1980) and Hopkins v. Zoning Hearing Board of Abington Township, __ Pa. Commonwealth Ct. __ 423 A.2d 1082 (1980). We note that both of these cases were decided well after the decision of the Zoning

Hearing Board and it is quite understandable that the propositions they decided were not fully taken into account by the Board. Pursuant to the principles enunciated in those two decisions and comparing the instant facts to those cases we find the zoning ordinance of Langhorne Borough as applied to the specific circumstances, including the specific number of persons living in the subject property; to be unconstitutional.

We recognize as did the Commonwealth Court in Children's Home of Easton, supra, that our Supreme Court has held in Glorioso Appeal, 413 Pa. 194, 198, 196 A.2d 668, 671 (1964) that "one who challenges the constitutionality of a zoning ordinance has no light burden and it is settled that before a zoning ordinance can be declared unconstitutional it must at least be shown that its provisions

are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare. If the validity of the legislative judgment is fairly debatable, the legislative judgment must be allowed to control."

Whether there are seven persons living in a traditional nuclear family home in which the ties are by blood or adoption or seven persons living in a home-like environment although only two of them are related to each other, the numerical result is the same. We cannot find in this record as the Commonwealth Court in Children's Home of Easton, supra, could not find in that record any evidence whatever "that there is any relationship much less a substantial relationship between the home established by appellant and the public health, safety, morals or general welfare of other persons

residing in the same residential district." at p. 833. Therefore as the Court did in Children's Home of Easton, supra, we conclude that the regulation is clearly arbitrary and unreasonable as applied to the precise circumstances of the instant case and as applied to the precise number of persons living in the subject property.

While the decision in Village of Belle Terre v. Bruce Boraas, 416 U.S. 1, 39 L. Ed. 2d 797, 94 S. Ct. 1536 (1974) would appear to have a general application to the subject ordinance, we find that the situation of seven persons considering their age, the home environment and the apparent permanence of their dwelling arrangement in the instant case is distinguished from six unrelated college students residing temporarily in a residential area and dictates a different result.

The case of Hopkins, supra, dealt with a residence into which a couple, husband and wife, brought three unrelated mentally retarded persons to live pursuant to a community living arrangement program developed by the Commonwealth of Pennsylvania through the Department of Public Welfare. The purpose of that arrangement was to place persons disabled by mental retardation into a family setting as nearly as normal as possible and into the mainstream of society.

There, as here, the user of the property sought to establish a family life as nearly normal as possible for persons who might otherwise be confronted with institutionalization. In Children's Home of Easton, supra, it was three foster children. In the instant case it is six elderly persons. In Hopkins, supra, as here the users of the property sought to strive to "mirror the residential

family life that surrounds them", at page 1084. The Court specifically found and held that there was "no rational relationship between the restrictive definition of family in the township ordinance and the state interest to preserve the residential character of the neighborhood." at page 1084. The Court held the definition unconstitutional as applied to the property users in that case.

The instant situation differs really from Children's Home of Easton and Hopkins, supra, only in the category of the persons who are being served by the effort to achieve a normal home life. In Children's Home of Easton, supra, it was foster children. In Hopkins, supra, it was mentally retarded persons and in the instant case it is elderly who are in danger of institutionalization.

We should note that while there is

not yet a formal program which has been adopted and established with respect to the elderly in Pennsylvania which would be comparable to the CLA Program which was the subject of Hopkins, supra, such a program is envisioned by the Department of Aging of the Commonwealth of Pennsylvania. In that Department's proposed rule-making with respect to domiciliary care services for adults, it sets forth in Section 21.3 thereof the following goals:

> "(1) To provide supportive, homelike, community-based living arrangements for adults who cannot live independently in the community.
>
> (2) To encourage and assist adults in developing and maintaining maximum initiative and self-determination in a home-like setting.
>
> (3) To prevent unnecessary institutionalization and to help individuals in institutions to return to their own community and, ultimately, if possible, to their own home." Pennsylvania Bulletin, Vol. 10, No. 51, December 20, 1980, page 4733 (emphasis supplied).

We believe that these policy goals set by the Department on Aging clearly emphasize and promote a homelike setting for persons who are elderly and who are confronted with precisely the terrible choice which confronts the elderly persons living in the subject property, institutionalization or aloneness.

We certainly realize that the size of a particular household could reach certain numbers such as to endanger the residential character of a residential neighborhood, but that in the instant case the numbers thus far attained do not reach such a figure and the decision of this case is limited to the precise facts which have been presented to the Court. Obviously, the municipality and the elderly both share in the desire that the living arrangement be limited in terms of its scope and size. For were the size to be too great the whole

concept of familial arrangement would disappear. And were the size to be too great the residential character of the entire neighborhood might be adversely affected.

One aspect of the situation which troubled the Zoning Hearing Board was the profit nature of the arrangement established by appellant. We do not believe that the manner in which the arrangement is made financially feasible controls the resolution of the case. It is the nature of the use and its character and its potential for adverse impact or non-potential for adverse impact upon the residential character of the neighborhood which must be analyzed, rather than the means by which the arrangement has been made economically possible. We note that in Hopkins, supra, one of the users of the subject property worked as a full-time houseparent and was paid to do so.

The fact that she was paid by a non-profit corporation does not mean that for her the operation did not involve compensation in money just as any profit realized by Ms. McGinnis would involve compensation for her efforts, and as any support payments made to the users in Children's Home of Easton, supra, were money compensation.

Appellee has cited us to the landmark case of Village of Belle Terre v. Bruce Boraas, 416 U.S. 1, 39 L.Ed. 2d 797 94 S. Ct. 1536 (1974) and we have reviewed that case. Appellee has also cited us to the following paragraph in Justice Douglas' opinion:

> "A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. This goal is a permissible one within Berman v. Parker, supra. The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet

> seclusion and clean air
> make the area a sanctuary for
> people." at page 804, 39
> L.Ed.2.

We do not believe that the concept of family values as set out by Justice Douglas is to be limited only to the persons who presently enjoy nuclear family living in a residential area. Elderly persons who may have lost a spouse or other members of their nuclear family and who may not be able to manage totally for themselves must not be forced to make a choice between aloneness and institutionalization. They too have a desire for family values. They too wish to live in a setting which as nearly as possible approximates traditional familial living arrangements. They too are entitled to a sanctuary and must not be confined to commercial, industrial or institutional areas of a municipality. They too have a right to live in a dignified residential

setting.

We must also note that these elderly people in the numbers presently living in the subject property are no real danger to the peace, quiet and tranquility of this community. They are simply struggling to live as they have always lived in a setting which permits them to feel the dignity of personal integrity, coupled with the association of other persons with whom they experience a sense of family if not family in fact. We do not believe it is possible for anyone to read the testimony in this record without experiencing a significant degree of empathy with the problems and aspirations of these elderly citizens.

We pay a high price when we institutionalize or isolate our elderly citizens from any genuine family life or from our concern. Appellee's brief argues that if one were to apply too extensive a definition

to "family" then all of us born since Adam and Eve would be part of one family. We agreed with this argument as it was applied to the rather tortured effort made by the appellant to establish a family relationship among her residents but we should note that in a very real sense we as a community of human beings must understand that our individual nuclear family values are not themselves fully realized until those family values are applied to our association with and our understanding of the problems of other members of our larger human family such as the elderly persons who are truly the subjects of this case. Otherwise those individual nuclear family values we prize so highly will have been only partially attained and only partially fulfilled. We believe that underlying the decisions in Children's Home of Easton and Hopkins, supra, is a recognition by the Commonwealth

Court that foster children are entitled to experience family values in a residential setting and that retarded persons are entitled to experience family values in a truly residential setting. Can we in this case in the light of the limited number of persons involved hold that elderly persons are not entitled to the same legitimate expectation of the pursuit of family values in a genuine residential setting? The question answers itself. We therefore make the following

O R D E R

AND NOW, this 24th day of March, 1981, the Appeal of Theresa McGinnis from the Decision of the Zoning Board of Adjustment of Langhorne Manor Borough is sustained.

BY THE COURT:

/s/ Edward G. Biester

EDWARD G. BIESTER, JR. J.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

IN RE: APPEAL OF THERESA McGINNIS from the decision of the LANGHORNE MANOR BOROUGH ZONING HEARING BOARD. : No.1013 C.D. 1981

: No. 1137 C.D. 1981

BEFORE: HONORABLE THEODORE O. ROGERS, Judge
HONORABLE GENEVIEVE BLATT, Judge
HONORABLE DAVID W. CRAIG, Judge

Argued: June 7, 1982 - Philadelphia

OPINION

OPINION BY JUDGE ROGERS FILED: 7/29/82

In these cross appeals, Theresa McGinnis and the Borough of Langhorne Manor seek review of an order of the Court of Common Pleas of Bucks County reversing the decision of the Langhorne Manor Zoning Hearing Board that Ms. McGinnis' use of her property as a group home for elderly persons constituted a violation of the Borough's Zoning Ordinance.

The facts, adduced during four lengthy hearings of the board conducted between January and April, 1980, are largely undisputed. In late June, 1979, Ms. McGinnis purchased a residentially zoned property and related improvements including a large single-family residence located at 401 Station Avenue in Langhorne Manor Borough. Shortly thereafter she began occupancy of the residence together with five elderly persons only

one of whom is related to Ms. McGinnis and none of whom are otherwise related to each other.[1] The particular circumstances of the living arrangement of these persons will be described at a later point in this opinion. Within the RA-Residential zoning district here at issue single-family detached homes, religious uses, non-profit educational uses, public recreational uses, and certain accessory and temporary uses are permitted by right. Schools operated for profit, nursing homes and private recreational uses are prohibited. Section 215 of the zoning ordinance defines the term "family,"permitted to occupy a single-family dwelling, as follows:

> One or more persons related by blood, marriage or adoption, and in addition, domestic servants or gratuitous guests thereof; or a group of not more than five persons who need not be so related, and in addition, domestic servants or gratuitous guests thereof, who are living together

> in a single non-profit dwelling unit and maintaining a common household with single cooking facilities. A roomer, boarder or lodger shall not be considered a member of the family.

On July 19, 1979, Mr. Max Einenkel, zoning officer and building inspector for the Borough, in response to the complaints of neighbors, who expressed them and at the hearings concern that an unlawful commercial use in the neighborhood would have an adverse effect on surrounding property values, attempted to deliver to Ms. McGinnis at her newly acquired home a copy of a letter written by Thomas J. Profy, III, Esquire, the Borough's solicitor, the contents of which was as follows:

> Dear Miss McGinnis:
>
> 401 Station Avenue, Langhorne Manor Borough is situate in an RA zoning district in which nursing homes, convalescent homes and related-type facilities are not permitted.

> Borough Council for which I am Solicitor has been contacted by various persons within the community who are under the impression that you intend to utilize the subject premises as a nursing home, convalescent home or related-type facilities. It may well be that you do not so intend to use the property but to avoid confusion and hardship upon you if you so utilize the premises and were forced to cease and desist, Borough Council has directed that I bring to your attention the zoning classification of the property and aforesaid limitation upon the use thereof.

Mr. Einenkel was refused entry to the house by Ms. McGinnis' sister and was told to leave the letter described above outside where, he was told, it would be retrieved after his departure. Ms. McGinnis later denied any knowledge of the letter.

On August 9, 1979, Mr. Einenkel again attempted to deliver a letter, dated August 8, 1979, written by himself, to Ms. McGinnis, notifying her that the current use of her property "as a multi-

person-boarding, nursing and convalescent home" was in violation of the zoning ordinance and requiring her to immediately cease and desist from such use. Again Mr. Einenkel was met at the door by Ms. McGinnis' sister who first agreed to inform Ms. McGinnis of Mr. Einenkel's presence but who then returned with a Mr. Jack Wilson who stated that Ms. McGinnis was unavailable and had authorized him to accept the letter; whereupon Mr. Einenkel delivered the letter to Mr. Wilson. Ms. McGinnis later testified that Mr. Wilson had been in her employ during the relevant period for the purpose of accomplishing certain repairs but she denied any knowledge of the August 8, 1979, letter.

On October 10, 1979, a criminal citation was issued charging Ms. McGinnis with the illegal "(o)peration of a nursing home or convalescent home for

3 or more individuals who are not related by blood or marriage in the property situate at 401 Station Ave . . . . ."
The citation was received by the appellant on October 16, 1979 and she appealed therefrom to the zoning hearing board where her position was that the residents of 401 Station Avenue constitute a family within the meaning of Section 215 of the zoning ordinance, above quoted, and, in the alternative, that the ordinance is unconstitutional as discriminating against groups of unrelated individuals who desire to reside together and, in any event, that she was entitled to a variance from the zoning strictures on account of the unnecessary hardship that would be caused to her by a literal application of the ordinance provision. The zoning board rejected each of these contentions on the basis, inter alia, of the following pertinent factual

findings:

7. Shortly after purchasing the subject property at 401 Station Avenue, Theresa McGinnis commenced use of the property as a commercial operation for the residential care of the aged.

8. Theresa McGinnis holds herself out to the public as offering a commercial service by providing residential care of the aged.

9. Theresa McGinnis has established a pattern of charges and regular fees for such services and the same has continued.

10. The operation of a residential home for the aged at 401 Station Avenue is commercial in nature and is a service operated for profit . . . ."

12. The immediate area of Langhorne Manor in which the subject property is located is exclusively residential.

14. The property in question is well suited as a private single family residence and could have been sold as such at the time Theresa McGinnis purchased the property . . . .

15. Residing at 401 Station Avenue beside the applicant, Theresa McGinnis, is her uncle and five (5) other individuals with no clear evidence establishing a specific family

relationship with the applicant.

The board concluded:

> 3. Other than her uncle, the individuals residing with Theresa McGinnis are not "family" in the traditional sense and within the first definition of the same found in Section 215 of the (zoning ordinance).
>
> 4. The present and proposed use of 401 Station Avenue as a residential home for the elderly is not "a single non-profit dwelling unit"; to the contrary, it is a commercial operation for profit and therefore the individuals residing with the owner/applicant are not "family" within the second and broader definition found in Section 215.
>
> 6. Theresa McGinnis has not proved the necessary legal factors which would entitle her to a variance in that no physical conditions peculiar to the particular property cause the unnecessary hardship which is a pre-requisite to a variance.
>
> 8. The property . . . can be fully and reasonably used as a single family residential dwelling in strict conformity with the R.A. Zoning District.
>
> 9. Theresa McGinnis has not proved that the Langhorne Manor Borough Zoning Ordinance is unconstitutional either in general or as applied to her.

As we have indicated the Court of Common Pleas reversed the action of the board holding that the zoning ordinance definition of "family," as applied to the particular circumstances of this, is unconstitutional. Where, as here, the lower court has taken no additional evidence, review by this Court is directed toward the decision of the zoning hearing board and is limited to a determination of whether the board abused its discretion or committed an error of law, and whether each necessary finding of fact is supported by substantial evidence. Haverford Township v. Zoning Hearing Board of Haverford Township, 55 Pa. Commonwealth Ct. 209, 423 A.2d 757 (1980).

We first express our agreement with the board and the trial court that Ms. McGinnis failed to meet her burden to show the unnecessary hardship

required to support the grant of a variance from the restrictive terms of a zoning ordinance. "(A) variance is justified only by the unnecessary hardship that results when physical characteristics peculiar to the property or incompatible neighboring uses make permitted development physically impossible or economically infeasible." Appeal of American Medical Centers, Inc., 54 Pa. Commonwealth Ct. 573, 577, 422 A.2d 1192, 1194 (1980). Here permitted development not only is possible and feasible but has been accomplished. The home occupied by Ms. McGinnis and her "guests" was, prior to their occupancy, used as a single-family dwelling. No physical characteristics peculiar to the property were claimed to exist or were the subject of proof at the hearings before the board. The Borough zoning officer testified that of the approximately twenty properties

neighboring that of Ms. McGinnis within a distance of one block, all but two are developed as single-family dwellings; the others being a permitted school and a non-conforming five unit apartment house. It was not claimed that these neighboring uses rendered the existing structure unsalable as a single-family residence and, indeed, Ms. McGinnis testified that in her opinion the house could be sold at a profit even if no zoning relief were granted. The discussion of the Supreme Court in Best v. Zoning Board of Adjustment, 393 Pa. 106, 109-110, 141 A.2d 606, 608-609 (1958), affirming the zoning board's refusal to grant a variance to the owner of a large Pittsburgh home containing "twenty-two rooms and seven baths" who desired for economic reasons to convert the edifice to multi-family use, is equally applicable here:

> The contentions of the appellant with respect to the refusal of her request for a variance are without merit and, indeed, are not urged on this appeal. When appellant purchased the Morewood house she knew or should have known of the provisions of the zoning ordinance restricting the property to use as a one-family dwelling and of the large expenditures required to maintain and keep up the property. Thus, appellant took the property with the conditions of economic hardship staring her in the face, and she cannot now be heard to complain . . . . Moreover, as we said in Michener Appeal, 382 Pa. 401, 406-407, 115 A.2d 367 (1955): "The law is well established that a variance may be granted only where a property is subjected to a hardship unique or peculiar to itself as distinguished from one arising from the impace of the zoning regulations on the entire district." . . . . The financial hardship suffered by the appellant in this case is no different from that endured by the owners of other large homes in the neighborhood. . . . (Citations omitted.)

Ms. McGinnis has devoted her efforts below and on this appeal chiefly to the contention that the zoning ordinance provision here at issue irrationally and,

therefore, unconstitutionally distinguishes between traditional families whose members are related by birth, marriage, or adoption, and which are permitted to reside in a single residential dwelling without limitation as to the number of individual residents, and groups of unrelated individuals which are prohibited from residing together in a Langhorne Manor Borough single family dwelling if their number exceeds five. We are convinced that the decision of the Supreme Court of the United States in Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) is controlling with respect to this issue. In Belle Terre a zoning ordinance single-family provision materially identical to that here at issue and having the effect of prohibiting the cohabitation of a gruop of six college students was sustained in the face of a groad constitutional challenge. No

persuasive reason has been offered why a municipality may, as a legitimate exercise of its police power, prohibit six college students from residing together in a single family zone but may not constitutionally prohibit the cohabitation of six unreated older persons.[2]

But more importantly, in our judgment, the decision of the board that Ms. McGinnis' enterprise is not permitted in the R.A. Residential District is primarily grounded on the commercial characteristics of that enterprise and the decision must be upheld on that basis. It has long been established beyond peradventure that a municipality may lawfully create residential zoning districts from which all commercial uses are excluded. Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Swade v. Springfield Township Zoning Board of Adjustment, 392, Pa. 269, 140 A.2d 597 (1958);

Volpe Appeal, 384 Pa. 374, 121 A.2d 97 (1956); Ward's Appeal, 289 Pa. 458, 137 A. 630 (1927)- In this context prohibited commercial uses may include fraternity houses, motels, boarding houses, and such institutions as nursing and convalescent homes. See e.g. Volpe Appeal at 377, 121 A.2d at 99; Harrisburg v. Pass, 372 Pa. 318, 93 A.2d 447 (1953); Devereux Foundation, Inc., Zoning Case, 351 Pa. 478, 41 A.2d 744, appeal dismissed, 326 U.S. 686 (1945). The validity of the prohibition does not depend, as Ms. McGinnis would have it, on a determination that the proposed commercial use would endanger the public health, safety, or morals of those living in the residential district. Best v. Zoning Board of Adjustment; Swade v. Spingfield Township Zoning Board of Adjustment.

Therefore, if the board's factual

findings concerning the commercial nature of Ms. McGinnis' enterprise are supported by substantial evidence it is clear that the use was property determined to be prohibited. The evidence on this score was that Ms. McGinnis charges a standard daily rate or fee for room and board of fourteen dollars to those of her patrons who require no nursing services and up to twenty dollars per day for those requiring more extensive care; that she described her operation at 401 Station Avenue as a business, styled the "Theresa McGinnis Residential Home," for purposes of federal income taxation and reported a gross income attributable to the business of $37,330.00 for the taxable year 1979 from which gross income was excluded $25,324.00 for cost of goods sold and operational expenses and $17,261.00 for other deductions including advertising expenses, depreciation,

licenses, wages and repairs; and that immediately preceding her arrival in Langhorne Manor Borough Ms. McGinnis had owned and managed a facility of an apparently identical nature in Cornwells Heights, Pennsylvania, styled a "Residential Home for Senior Citizens" on stationery of which was advertised a purpose to "Care for Senior Citizens Daily, Weekly, Week-ends and Permanent Basis" and at which location were housed on the same terms many of the persons later residing at the subject property in the Borough. We cannot say, especially in the light of the complete absence of evidence having a contrary import,[3] that the factors just recited are insufficient to support the board's determination that Ms. McGinnis was engaged in a commercial endeavor designed and intended to be, if not yet realizing that intention, profitable.

Finally, we note that the court below seems to have been persuaded that the services provided by Ms. McGinnis to a number of elderly persons in her community are valuable and in accord with certain statements of policy attributed to the Commonwealth Department of Aging. We do not disagree. The record admits of no conclusion other than that the elderly residents in Ms. McGinnis' charge have benefited greatly from her expert care as well as from the companionship and healthful environment her residential home provides. However, as we have earlier emphasized, the issue is not whether Ms. McGinnis ought to be permitted to carry on her useful vocation but whether it is within the power of the municipality to exclude commercial activities from residential zoning districts. The Borough has such power

and no more than the proper exercise fo such power is here challenged.

In the matter of the Borough's appeal to No. 1137 C.D. 1981, the order below is reversed. The trial court disposed of all of the issues before it by an order which simply sustains Ms. McGinnis' zoning appeal. It will be recalled that the Zoning Hearing Board had also refused Ms. McGinnis' application for a variance for her home and that the trial court, in the course of the opinion in support of its order, rejected her appeal from this action. Although Ms. McGinnis won in the trial court, she filed a cross appeal to save her position with respect to the variance. We affirm the lower court's decision on this issue.

THEODORE O. ROGERS, J.

---

1. Ms. McGinnis disingenuously testified that a number of her patrons were related to her as "aunts." However, the testimonial evidence failed to support this claim and the board properly found that the only resident related to her was Mr. James McGinnis, the brother of appellant's father. Moreover, it was finally conceded that at least two of the six members of the group were unrelated to the others and Section 215 prohibits any group of greater than five members from residing together if any member of the group is unrelated to the others.

2. Moore v. East Cleveland, 431 U.S. 494 (1977) relied on by Ms. McGinnis, is not to the contrary. In Moore the Court held to be unconstitutional a housing ordinance which had the effect of creating criminal culpability on the part of a grandmother who resided with her son and her two grandsons. Mr. Justice Powell, writing for the plurality, reasoned that the regulation at issue was unjustifiably intrusive and violative of the protections traditionally afforded to the sanctity of the family. Of Belle Terre, Mr. Justice Powell wrote:

> (O)ne overriding factor sets this case apart from Belle Terre. The ordinance there affected only unrelated individuals. It expressly allowed all who were related by "blood, adoption, or marriage" to live together, and in sustaining the ordinance we were careful to note that it promoted "family

> needs" and"family values". 416 U.S. at 9 . . . . East Cleveland, in contrast, has chosen to regulate the occupancy of its housing by slicing deeply into the family itself. (Emphasis in original).

Id. at 498. The concurring opinions of Mr. Justice Brennan and Mr. Justice Stevens are equally explicit in their reassertion of the viability of Belle Terre. Id. at 511, 519 n. 15. In the instant case the ordinance challenged, like that in Belle Terre and unlike that in Moore, permits related persons to reside together without limitation and attempts only to regulate the number of unrealted persons who may reside in a single dwelling.

Ms. McGinnis also relies, as did the court below, on two decisions of this court in which it was held that single-family zoning ordinance provisions similar to that here at issue could not prevent unrelated foster children or

mentally retarded children from living with an adult couple in a domestic environment intentionally structured under the auspices of agencies of the Commonwealth so as to mirror a traditional nuclear family. Hopkins v. Zoning Hearing Board of Abington Township, 55 Pa. Commonwealth Ct. 365, 423 A.2d 1082 (1980); Children's Home of Easton v. City of Easton, 53 Pa. Commonwealth Ct. 216, 417 A.2d 830 (1980). In Hopkins and Children's Home of Easton Belle Terre was factually distinguished on the grounds that the six unrelated college students there involved did not constitute the equivalent of a nuclear family.

The living arrangement involved in the case sub judice, unlike that in Hopkins and Children's Home of Easton, embodies no permanent commitment on the

part of the individual residents. The record here reveals that during the course of the hearings before the board at least one and perhaps two of the residents at Ms. McGinnis' home had gone elsewhere. Each resident is free to leave at any time unfettered by the legal, social and moral bonds -- including those bonds created, for example, by a commitment to the task of child rearing -- that import greater stability to nuclear families. In sum, each of these cases must turn on its facts and with the exception of the age of the residents, the living arrangement here involved is very much like that of Belle Terre and unlikely to be mistaken for a nuclear family.

We have also examined but are unpersuaded by the many authorities of other jurisdictions cited in appellant's brief for the proposition that unrealted individuals must be permitted to reside

together despite local zoning ordinance provisions to the contrary. A number of these cases were decided prior to Belle Terre, others represent factual circumstances involving, as did Hopkins and Children's Home of Easton, the equivalent of a nuclear family, others concern issues not here present; for example, whether unmarried couples or members of a religious order may be prohibited from living together.

3. Ms. McGinnis, acting on advise of her counsel, resisted throughout the hearings before the board attempts to elicit evidence concerning the nature of her enterprise in the Borough: refusing to answer questions concerning her financial arrangements with those living at the residential home; claiming, without citation to authority, that all such matters are privileged; refusing to produce, despite the failure to obtain a

protective order, business records the subject of subpoenas duly issued; and claiming a "banker-client" privilege in an attempt to prevent the testimony of Mr. Ira Wright, Assistant Vice President of the First National Bank and Trust Company of Newtown, with respect to the financial particulars of her purchase of the subject property.

Of course it was the appellant's burden to establish her use of the property was permitted under the ordinance or that sufficient hardship existed to justify a variance from the ordinance's terms. Here the appellant's intransigence and persistent refusal to cooperate with the fact finding tribunal cannot have been helpful to her cause and, although we do not here face the issue as the findings of the board are adequately supported, we would be inclined to sustain the fact finder in any case where a party

who refuses to cooperate or to divulge necessary information properly requested is found to have failed to meet his evidentiary burden.

IN THE COMMONWEALTH COURT OF PENNA.

IN RE: APPEAL OF THERESA McGINNIS from the decision of the LANGHORNE MANOR BOROUGH ZONING HEARING BOARD, : NO.1013 C.D. 1981

THERESA McGINNIS, Appellant :

IN RE: APPEAL OF THERESA McGINNIS from the decision of the LANGHORNE MANOR BOROUGH ZONING HEARING BOARD :NO. 1137 C.D. 1981

LANGHORNE MANOR BOROUGH, Appellant :

ORDER

AND NOW, this 29th day of July, 1982, in the matter of the appeal of the Langhorne Manor Borough to No. 1137 C.D. 1981 , the order below made March 24, 1981 is reversed; in the matter of Theresa McGinnis's appeal to No. 1013 C.D. 1981, from the refusal of a variance, the decision of the Court of Common Pleas of Bucks County is affirmed.

THEODORE O. ROGERS, J.

APPENDIX D

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The following provisions of the Constitution of the United States are involved:

AMENDMENT I

Congress shall make no law respecting an establishing of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. The following provision of the Zoning Ordinance of Langhorne Manor Borough is involved:

Section 215 Family

One or more persons related by blood, Marriage or adoption and in addition, any domestic servants or gratuitous guests thereof; or a group of not more than five persons who need not be so related, and in addition, domestic servants or gratuitous guests thereof, who are living together in a single non-profit dwelling unit and maintaining a common household with single cooking facilities. A roomer, boarder or lodger shall not be considered a member of the family.

SUPREME COURT OF PENNSYLVANIA
QUESTIONS PRESENTED IN
PETITION FOR ALLOWANCE OF APPEAL

1. Where the Commonwealth Court has held that foster parents and foster children and houseparents and mentally retarded children constituted the functional equivalent of biological families and zoning ordinances which barred them from single-family residential districts were unconstitutional as applied, is it a denial of equal protection and state public policy for the Commonwealth Court to hold that the elderly residents and Ms. McGinnis cannot be considered the functional equivalent of a biological family?

2. Where the elderly residents have a liberty interest in avoiding transfer trauma and have not been accorded due process, was it error for the Commonwealth Court and the Zoning Hearing Board to fail to determine the due process necessary to assure these elderly residents their constitutional rights before denying the McGinnis applications before the Zoning Hearing Board?

3. Where the Commonwealth Court previously decided that foster children and foster parents and houseparents and mentally retarded children constituted the functional equivalent of biological families despite the fact that the parents were paid to care for the children and other commercial dealings were implicated in the relationship and the Zoning Hearing Board's findings of fact and

conclusions of law as to those commercial indicia which differed from those present in Hopkins (infra) and Easton (infra) were not supported by substantial evidence, was it error for the Commonwealth Court to decide that the commercial dealings between Ms. McGinnis and her elderly residents barred the use under the Langhorne Manor Borough Zoning Ordinance?

4. Where the cross-appeal was filed to preserve the issues of constitutionality in general, permissive use and entitlement to a variance, was it error for the Commonwealth Court to ignore the first two issues and consider the appeal to be only from the denial of a variance?

No. 82-1605

Office Supreme Court, U.S.
FILED
APR 29 1983
ALEXANDER L. STEVAS,
CLERK

In The

Supreme Court of the United States

October Term, 1982

IN RE: APPEAL OF THERESA McGINNIS

FROM THE DECISION OF THE LANGHORNE MANOR ZONING HEARING BOARD.

On Writ of Certiorari to the Commonwealth Court of Pennsylvania

BRIEF FOR RESPONDENT LANGHORNE MANOR BOROUGH

EDWIN N. POPKIN
BEGLEY, CARLIN & MANDIO
Attorneys for Respondent
Langhorne Manor Borough
120 Mill Street
P.O. Box 705
Bristol, Pennsylvania 19007
(215) 788-0471

8487
Rapid Service
•NJ (201) 257-6850•NY (212) 840-9494•PA (215) 563-5587
MA (617) 542-1114•DC (202) 783-7288•USA (800) 221-0008

QUESTIONS PRESENTED

I. Does the Constitution of the United States require Langhorne Manor Borough to allow petitioner's admittedly commercial and primarily institutional facility consisting of a boarding home or care facility for the elderly to be located in the Borough's most restrictive residential zoning district?

II. Does the Equal Protection Clause of the United States Constitution prohibit Langhorne Manor Borough from permitting foster homes for foster or mentally retarded children in its most restrictive residential zone, while at the same time excluding facilities such as petitioner's which are commercial and primarily institutional?

III. Is the asserted issue regarding the elderly residents of petitioner's home properly before this Court where those residents are not, nor have they ever been, a party to the action, and where such asserted rights have not been properly raised below?

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Table of Citations iii

Statement of the Case 1

Argument:

I. The Constitution of the United States does not require Langhorne Manor Borough to allow petitioner's admittedly commercial and primarily institutional facility consisting of a boarding home or care facility for the elderly to be located in the Borough's most restrictive residential zoning district. 6

II. The Equal Protection Clause of the United States Constitution does not prohibit Langhorne Manor Borough from permitting foster homes for foster or mentally retarded children in its most restrictive residential zone, while at the same time excluding facilities such as petitioner's which are commercial and primarily institutional. 12

III. The asserted issue regarding the elderly residents of petitioner's home is not properly before this Court where those residents are not, nor have they ever been, a party to the action, and where such asserted rights have not been properly raised below. 19

Conclusion 22

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Baltimore & Ohio Railroad Company v. Commonwealth of Pennsylvania, Department of Labor and Industry, 461 Pa. 68, 334 A. 2d 636 (1975) 13

Children's Home of Easton v. City of Easton, 53 Pa. Cmwlth. Ct. 216, 417 A.2d 830 (1980) 9, 13, 16, 17, 18

Costley v. Caromin House, ____ Minn. ____, 313 N.W. 2d 21 (Minn. 1981) 11

Crowley v. Knapp, 288 N.W. 2d 815 (Wisc. 1980) 12

Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) 15

Holy Name Hospital v. Montroy, 379 A. 2d 299 (N.J. 1977) 9

Hopkins v. Zoning Hearing Board of Abington Township, ____ Cmwlth. Ct. ____, 423 A. 2d 1082 (1980) 9, 13, 16, 17, 18

Missionaries of Our Lady of LaSallette v. White Fish Bay, 66 N.W. 2d 627 (Wisc. 1954) 9

Moore v. City of East Cleveland, 413 U.S. 494 (1977) 8

New Orleans v. Dukes, 427 U.S. 297, 96 S. Ct. 2513, 49 L. Ed. 29 511 (1976) 12

Contents

Page

Pennsylvania George Junior Republic v. Zoning Hearing Board of Cool Springs Township, 27 Pa. Cmwlth. Ct. 151, 389 A. 2d 261 (1978) 10

State v. Baker, 81 N.J. 99, 405 A. 2d 638 (1979) 8

Swade v. Springfield Township Zoning Board of Adjustment, 392 Pa. 269 (1978) 15

Tosto v. Pennsylvania Nursing Home Loan Agency, 460 Pa. 1, 331 A. 2d 198 (1975) 12, 13

Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) 7, 15

Wengert v. Zoning Hearing Board of Upper Merion, 51 Pa. Cmwlth. Ct. 79, 414 A. 2d 148 (1980) 10

White Plains v. Ferraioli, 357 N.Y.S. 2d 449, 313 N.E. 2d 756 (N.Y. 1974)..... 8

Statute Cited:

Minnesota Statute §462.357, subd. 7 (1980) 11

Rule Cited:

Supreme Court Rule of Procedure 21(1)(h) 20

Other Authority Cited:

Annotation A.L.R. 3d 693 (1976)..... 10

No. 82-1605

In The

Supreme Court of the United States

October Term, 1982

IN RE: APPEAL OF THERESA McGINNIS

FROM THE DECISION OF THE LANGHORNE MANOR ZONING HEARING BOARD.

On Writ of Certiorari to the Commonwealth Court of Pennsylvania

BRIEF FOR RESPONDENT LANGHORNE MANOR BOROUGH

STATEMENT OF THE CASE

Theresa McGinnis, in her individual capacity, purchased the subject property located at 401 Station Avenue, Langhorne Manor Borough, Pennsylvania, in June of 1979. The property is zoned R-A single family residential, within which district all commercial and institutional uses are prohibited and the primary permitted use is single-family detached dwellings. Despite the foregoing limitation with respect to the permitted uses in the R-A zoning district, Ms. McGinnis has at all times since her purchase of the property used it as a commercial care facility or boarding home for senior citizens. Ms. McGinnis is experienced in such business

operation, having previously maintained an apparently identical operation in Cornwells Heights, Bucks County, Pennsylvania, prior to her purchase of the subject property. The prior business was styled a "Residential Home for Senior Citizens" on stationery which advertised a purpose to "Care for Senior Citizens Daily, Weekly, Week-Ends and Permanent Basis". Many of the persons presently residing with Ms. McGinnis at the subject property, previously were housed by her on the same terms and conditions at her previous business address in Cornwells Heights.

When Ms. McGinnis' use of the property came to the attention of Borough officials, she had residing with her in her home, her uncle and five other unrelated adult individuals. During the course of the proceedings before the Borough Zoning Hearing Board, however, at least one and perhaps two of the residents at Ms. McGinnis' home left and were replaced by other residents. Although Ms. McGinnis was previously a nurse by profession, she does not provide nursing services for the individuals residing with her, all of whom are ambulatory, continent, and for the most part, capable of taking care of their own physical needs.

While Ms. McGinnis never disclosed the nature of her use to the Borough in applications for any use or occupancy permits and refused to cooperate throughout the Zoning Hearing Board proceedings by failing to answer questions attempting to elicit evidence concerning the nature of her enterprise in the Borough, the evidence that was presented clearly establishes that her use is primarily both commercial and institutional, and not familial. The individuals boarding with Ms. McGinnis pay her a fixed monthly or weekly sum in compensation for their room and board. The monies paid, while varying with respect to what they can afford or what the traffic will bear, are not in any way correlated to the boarder's share of expense of maintaining the home. The lower courts all found and Ms. McGinnis concedes that her operation is primarily commercial in nature and the evidence in

the record on this matter, including her business mortgage loan applications and business tax returns, unquestionably establishes this fact. Despite Ms. McGinnis' contentions that she does not hold herself out as running a commercial establishment, the facts are to the contrary. She describes her operation at 401 Station Avenue as a business, styled the "Theresa McGinnis Residential Home" for the purpose of federal income taxation and reported gross income from which she excludes the cost of goods sold, operational expenses and other deductions including typical business deductions for advertising expenses, depreciation, licenses, wages and repairs.

In response to the foregoing situation, the Borough officials sent written notices to Ms. McGinnis advising her with respect to the use regulations in the R-A zoning district and requesting her to cease and desist from the aforesaid use of the property. Not only did Ms. McGinnis ignore these notices, but she also denied ever having any knowledge of same during her testimony before the Zoning Hearing Board. As a result of this situation, on October 10, 1979, the Borough Zoning Officer cited Ms. McGinnis for failure to comply with the use regulations in the R-A district. She appealed from the issuance of this citation to the Borough Zoning Hearing Board, and, at the same time, requested a variance from the use regulations of the R-A district or, in the alternative, a determination that the Borough Zoning Ordinance is unconstitutional in general or invalid as applied to her property. During extensive hearings before the Zoning Hearing Board, the Borough established that petitioner's use was primarily commercial and institutional, and that it was not equivalent to that of a nuclear family.

The record shows that the home is owned by Ms. McGinnis individually and is used for the same purpose and in the same business manner as her previous property at 1676 Hulmeville Road, Cornwells Heights, Pennsylvania, which Ms. McGinnis referred

to and advertised as a "Residential Home for Senior Citizens". Ms. McGinnis, in her testimony, went to great lengths to explain that she was not operating a nursing home or other type of state-recognized facility for the care of the elderly.[1] The individuals boarding with Ms. McGinnis are all ambulatory, continent, and basically capable of taking care of their own physical needs. They all dress and feed themselves, are free to come and go as they like, including for automobile rides, and with respect to the ladies, to the hairdressers. Some of the individuals also appear to help in preparing food and doing other tasks or chores around the household although this seems to be more by choice of the individual boarder than by any firm agreement with Ms. McGinnis. While Ms. McGinnis has a B.S. and M.A. in nursing, she concedes that the relationship with her boarders is not that of nurse and patient, and that she does not provide any nursing services whatsoever for the individuals who rent rooms from her. At most, she may help some of the individuals with diet or the taking of medication if that is necessary. The record is also clear that the boarders do not share in the duties or expenses of maintaining a common household. Instead, they pay Ms. McGinnis a fixed monthly or weekly sum in compensation for the room and board provided for them. The money paid by each boarder, while possibly varying to take into account what the traffic would bear, is not in any way correlated to each boarder's share of the expenses of maintaining the home. In fact, the charge for the boarders does not vary depending upon how many residents are in the home, but remains constant. In addition, and probably of most significance, Ms. McGinnis in her mortgage application for the

---

1. Clearly, a nursing home or other similar facility which is regulated under the auspices of the Commonwealth of Pennsylvania would not be permitted in the R-A residential district as the equivalent of a single-family dwelling. Such a use would, however, be permitted as of right in the institutional and R-C zoning districts within the Borough.

instant property and in her federal income tax return acknowledges that she is in the business of maintaining a residence for senior citizens. In her mortgage application, she estimated her monthly income from the business at $1,000. In her federal income tax return, Schedule C, she lists all of the monies paid by her boarders as business income and takes all of the standard business deductions available including deductions for mortgage interest, advertising and depreciation of the real estate and personal property. Also, we note that Ms. McGinnis employs a bookkeeper and C.P.A. to maintain the books and records of the business.

In response to the foregoing evidence establishing the primarily commercial nature of the use and the non-familial nature of the use, Ms. McGinnis not only failed to present contrary evidence, but she persistently refused to cooperate with the fact finding tribunal by refusing to divulge necessary information properly requested, as recognized by the Commonwealth Court of Pennsylvania in footnote 3 of their opinion.

After the close of the hearings before the Zoning Hearing Board, the Board rendered comprehensive finding of fact, conclusions of law, and a decision upholding the cease and desist order and denying and dismissing the appeal of Ms. McGinnis therefrom.

Ms. McGinnis appealed the Zoning Hearing Board's decision to the Court of Common Pleas of Bucks County, Pennsylvania. That County Court upheld the Zoning Hearing Board's decision in part, concluding that Ms. McGinnis' use was not permitted of right, nor was she entitled to a variance. The County Court, however, concluded that the Langhorne Manor Borough Zoning Ordinance was unconstitutional as applied to Ms. McGinnis' proposed use. From this decision, both parties appealed to the Commonwealth Court of Pennsylvania, which court in a unanimous opinion by a three judge panel, reversed the opinion

of the County Court below and upheld the constitutionality of the Borough Zoning Ordinance. Thereafter, petitioner filed a petition for allowance of appeal with the Pennsylvania Supreme Court and on December 28, 1982 the petition was denied. This appeal followed.

ARGUMENT

I.

The Constitution of the United States does not require Langhorne Manor Borough to allow petitioner's admittedly commercial and primarily institutional facility consisting of a boarding home or care facility for the elderly to be located in the Borough's most restrictive residential zoning district.

Langhorne Manor Borough, like most municipalities within the United States, has elected to limit its most restrictive zoning district primarily to single-family dwellings. The ordinance defines "Family" as follows:

> "One or more persons related by blood, marriage or adoption, and in addition, any domestic servants or gratuitous guests thereof; or a group of not more than five persons who need not be so related, and in addition, domestic servants or gratuitous guests thereof, who are living together in a single non-profit dwelling unit and maintaining a common household with single cooking facilities. A roomer, boarder or lodger shall not be considered a member of the family."

In so doing, the Borough has excluded all commercial and institutional uses from this R-A zoning district. Such a limitation to single-family dwellings has been recognized throughout the

history of zoning as legitimately preserving family needs and values and has been court approved by all jurisdictions, including the United States Supreme Court. In the landmark United States Supreme Court decision in the case of *Village of Belle Terre v. Boraas,* 416 U.S. 1 (1974), Justice Douglas stated:

> "A quiet place where yards are wide, people are few and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. This goal is a permissible one within Berman vs. Parker, supra. The police power is not confined to a elimination of filth, stench and unhealthy places. It is ample to lay out zones where family values, youth values and the blessings of quiet seclusion and clean air make the area a sanctuary for people." (U.S. page 9).

The *Belle Terre* case involved a constitutional challenge to the zoning ordinance of a small residential community in Long Island, New York, which is similar to Langhorne Manor Borough in many respects.[2] The Belle Terre Zoning Ordinance which was the subject of the challenge was, however, more restrictive than the ordinance of Langhorne Manor Borough. The Belle Terre ordinance defined the "family" as:

> "One or more persons related by blood, adoption or marriage, living and cooking together as a single housekeeping unit, exclusive of household servants.

---

2. Langhorne Manor Borough is a small, predominately residential area, measuring less than one mile in length, containing .65 square miles and having a population of approximately 1200 persons. Seventeen percent (17%) of the area of the Borough is zoned institutional, in which area Ms. McGinnis' use is permitted as of right.

> A number of persons but not exceeding two living and cooking together as a single housekeeping unit though not related by blood, adoption or marriage."

The Supreme Court, per Justice Douglas, held that this ordinance was constitutional and that the town could properly prevent six unrelated adult individuals who were fraternity brothers from living together in a single-family residential unit.

Since the *Belle Terre* decision, the courts in this country have continued to recognize that the preservation of family needs and values are a legitimate zoning purpose, and have uniformly upheld the constitutionality of limiting zoning districts to single-family residential use. What the courts have struggled with has been the extent to which a municipality can constitutionally limit the definition of "family", and, thereby, exclude extended families or unrelated individuals from living together. For instance, in *Moore v. City of East Cleveland,* 413 U.S. 494 (1977), the Supreme Court held that it was unconstitutional to define family so narrowly as to prevent a grandmother from living with her two grandsons.

In the instant case, petitioner argues that the *Belle Terre* and *Moore* decisions should be expanded to provide federal constitutional protection to groups of unrelated individuals who wish to reside together in single-family zoning districts. Petitioner cites cases from several state jurisdictions, including the Commonwealth of Pennsylvania, which have either through state statutory provisions or through interpretation of state constitutional provisions, afforded unrelated individuals the right to live together in single-family zoning districts in certain limited situations. For instance, the cases of *State v. Baker,* 81 N.J. 99, 405 A. 2d 638 (1979) and *White Plains v. Ferraioli,* 357 N.Y.S. 2d 449, 313 N.E. 2d 756 (New York 1974), involved exclusions of unmarried couples living together as a family. Others such as

Holy Name Hospital v. Montroy, 379 A. 2d 299 (N.J. 1977) and *Missionaries of Our Lady of LaSallette v. White Fish Bay*, 66 N.W. 2d 627 (Wisconsin 1954), involved exclusions of religious orders. Likewise, the Courts of Pennsylvania have recognized certain limited circumstances in which unrelated individuals may not be prohibited from residing together. In *Children's Home of Easton v. City of Easton*, 53 Pa. Cmwlth. Ct. 216, 417 A. 2d 830 (1980) and *Hopkins v. Zoning Hearing Board of Abington Township*, ____Cmwlth. Ct.____, 423 A. 2d 1082 (1980), the Courts of Pennsylvania have held that a municipality may not preclude an existing biological family from taking in a limited number of foster children, nor may a municipality preclude a non-profit corporation from occupying a single-family dwelling in which it housed adult houseparents acting in loco parenatis for three mentally retarded children who permanently resided with them in the house. The rationale behind all of the foregoing cases is that there must be a rational relationship between the restrictions contained in the local municipal ordinance and the governmental interest in preserving the residential character of the neighborhood, so as to permit within these districts unrelated persons to live together in circumstances where their living arrangement is the functional equivalent of a biologically related family.

While our research has not disclosed any federal court decisions which have upheld, on constitutional grounds, the right of unrelated persons to live together in a single-family zoning district even in the limited circumstances involved in the foregoing State cases, the issue as to whether unmarried individuals, foster families, or other groups equivalent to the biological family have a constitutional right to live in a single-family zoning district is not the issue that is before the court in the instant petition. Under the terms of the Langhorne Manor Borough Zoning Ordinance, all of the foregoing uses would be permitted in the R-A zoning district as a matter of right. The Langhorne Manor Borough Zoning Ordinance defines families so as to include, with an outside

number limit, the right of unrelated individuals to reside together as long as they live in a non-profit environment and maintain a common household, *i.e.*, where the arrangement is the functional equivalent of a biologically related family such as a foster home or similar use.

What the petitioner is really requesting in the instant petition is for this Court to establish completely new constitutional doctrine and hold that the federal constitution affords unrelated individuals the right to live together in single-family zoning districts even where the nature of their use is primarily commercial or institutional. It is submitted that no case in any jurisdiction, either state or federal, has ever even hinted that the federal constitution affords such a right. Many of the cases dealing with the issue as to the constitutional limitations on the right of unrelated persons to live together in single-family zoning districts are collected in an annotation found at 71 A.L.R. 3d 693 (1976). None of the cases in this annotation, and the supplement thereto, however, come close to supporting the position of petitioner herein. Where the use in question has not been held to be the functional equivalent of a biologically related family, but, on the contrary, is primarily commercial or institutional, as in the case herein, the courts of all of the jurisdictions to address such an issue have uniformly held that such uses are not entitled to constitutional protection. *See Pennsylvania George Junior Republic v. Zoning Hearing Board of Cool Springs Township*, 27 Pa. Cmwlth. Ct. 151, 389 A. 2d 261 (1978) and *Wengert v. Zoning Hearing Board of Upper Merion*, 51 Pa. Cmwlth. Ct. 79, 414 A. 2d 148 (1980).

The cases which petitioner cites in support of her argument, especially those which it is suggested afford constitutional protection to living arrangements which are primarily commercial in nature, do not, even on superficial analysis, stand for the propositions for which petitioner cites them.

The case upon which petitioner primarily relies, *Costley v. Caromin House,* ____Minn.____, 313 N.W. 2d 21 (Minn. 1981) was not decided on constitutional grounds, either state or federal. On the contrary, the holding of the case was that the retarded individuals involved were permitted to reside within the single-family zoning district of the city in question as a matter of right under the terms of the city's ordinance. The city ordinance in question, unlike the ordinance in Langhorne Manor Borough, did not restrict the definition of family to non-profit dwelling units so the court held that the use in question, despite its arguably commercial nature, came within the ordinance definition of family and could not, therefore, be prohibited as a matter of statutory construction. In addition, it should be pointed out that Minnesota has enacted a state statute[3] which prohibits a municipality from excluding groups of mentally retarded or physically handicapped persons from residing together in residential zoning districts as long as they live in state licensed group or foster homes, serving six or fewer individuals. The state statute mandates that such uses be considered as permitted single-family residential uses for purposes of zoning within the State of Minnesota. Further, in *Costley, supra,* the use in question was a state licensed group home which had obtained a certificate of need from the Minnesota Department of Health, and location approval from the Minnesota Department of Public Welfare. As such, it would appear clear that an alternative ground for the relief granted by the court would be state pre-emption of the local municipal zoning regulations. In the case at bar, Ms. McGinnis' use is not in any way sanctioned by the state and is not part of the Commonwealth fostered programs for the placement of foster or mentally retarded children in residential environments.

---

3. Minn. Stat. §462.357, subd. 7 (1980).

The other case relied upon by petitioner, *Crowley v. Knapp*, 288 N.W. 2d 815 (Wisc. 1980), does not even involve issues of zoning. On the contrary, it merely involved the interpretation of a deed restriction.

For the foregoing reasons, it is submitted that the instant petition does not present any special or important reasons for the grant of certiorari. It does not involve a situation where federal or state court decisions are in conflict, nor, we submit, does it involve an important question of federal law which has not been settled. On the contrary, uses which are primarily institutional or commercial have, as the very basis for zoning, traditionally been excluded from residential zones. As such, the petition for certiorari in this case should, we submit, be denied.

II.

The Equal Protection Clause of the United States Constitution does not prohibit Langhorne Manor Borough from permitting foster homes for foster or mentally retarded children in its most restrictive residential zone, while at the same time excluding facilities such as petitioner's which are commercial and primarily institutional.

In order to succeed with her equal protection argument, petitioner must establish that the distinctions made by Langhorne Manor Borough and the Courts of Pennsylvania in these type of cases bear no rational relationship to the legitimate legislative purpose of the municipality in preserving residential values in an R-1 residential zone. This standard of review in equal protection cases known as the "Rational Basis" test has uniformly been applied in evaluating equal protection challenges both in the United States Supreme Court and in various state courts. *New Orleans v. Dukes*, 427 U.S. 297, 96 S. Ct. 2513, 49 L. Ed. 29 511 (1976); *Tosto v. Pennsylvania Nursing Home Loan Agency*, 460 Pa. 1,

331 A. 2d 198 (1975); *Baltimore & Ohio Railroad Co. v. Commonwealth of Pennsylvania, Department of Labor & Industry,* 461 Pa. 68, 334 A. 2d 636 (1975).

Analyzing the situation in light of this standard, we submit that the Borough Zoning Ordinance and the Pennsylvania Court's holding in this case is clearly consistent with the constitutional requirements of equal protection. The opinion of the Commonwealth Court of Pennsylvania makes reference to numerous distinctions between McGinnis' use and those which have previously been permitted in residential zones, any one of which distinctions is reasonably related to the purpose of preserving residential values and is, therefore, sufficient to meet any challenge on the basis of equal protection. The Pennsylvania Court in its opinion recognized two clear distinctions between petitioner's use and the uses involved in *Children's Home of Easton v. City of Easton,* ____Pa. Cmwlth. Ct.____, 417 A. 2d 830 (1980); and *Hopkins v. Zoning Hearing Board of Abington Township,* ____Pa. Cmwlth. Ct.____, 423 A. 2d 1083 (1980), which petitioner attempts to analogize to her situation, both of which distinctions are clearly related to a preservation of residential values. First of all, the Pennsylvania Court recognized that petitioner's use is primarily commercial, while those involved in the cited cases are not. Secondly, the Pennsylvania Court recognized that petitioner's use is not the functional equivalent of a biological family, while the use involved in *Children's Home of Easton* and *Hopkins* were clearly the equivalent of what one would expect in a residential neighborhood.

Turning to the first distinction referred to by the Pennsylvania Commonwealth Court, the undisputed facts are that what Ms. McGinnis is operating is primarily a business or commercial operation. While the nature of the business is that of a boarding home which, to date, has been limited to senior citizens, this does not make her use any the less commercial. The Borough Zoning

Hearing Board held, which holding was found by the Pennsylvania Appellate Courts to have been supported by substantial evidence, that the boarders do not share in the duties or expenses of maintaining the common household. Instead, they pay Ms. McGinnis a fixed monthly or weekly sum in compensation for the room and board provided them. The money paid by each boarder, while possibly varying to take into account what the traffic would bear, is not in any way correlated to each boarder's share of the expenses of maintaining the home. In fact, the charge for the boarders does not vary depending upon how many residents are in the home but remains constant. In addition, and probably of most significance, Ms. McGinnis in her mortgage application for the instant property and in her federal income tax return acknowledges that she is in the business of maintaining a residence for senior citizens. In her mortgage application, she estimated her monthly income from the business at $1,000. In her federal income tax return, Schedule C, she lists all of the standard business deductions available including deductions for mortgage interest, advertising and depreciation of the real estate and personal property.

Ms. McGinnis does not dispute that her use is primarily business or commercial. In her statement of the case before the Pennsylvania Court she stated:

> "The residential home is not being operated as non-profit; Ms. McGinnis receives compensation for the operation of the home and spends all of her time there."

Given the fact that Ms. McGinnis' operation is primarily that of a commercial use, it appears self-evident, as the Commonwealth Court recognized, that such a use can constitutionally be excluded from Langhorne Manor Borough's most restrictive residential district, and can only be permitted within the Borough's

institutional or commercial district. The basic foundation of zoning principles is premised upon such differences in use and is sufficient to justify the exclusion of Ms. McGinnis' use from the residential district without any need to go into an analysis of the *Belle Terre* case or its progeny regarding the definition of family. Ms. McGinnis' argument to the contrary, that the prohibition of her use depends upon a determination that the proposed commercial use would endanger the public health, safety or morals of those living in the residential district, is an incorrect statement of the law and is contrary to one of the basic principles behind the law of zoning and the establishment of residential districts by means of zoning, the constitutional validity of which was affirmed by this Court in the *Belle Terre* case. As this Supreme Court, as well as the Supreme Court of Pennsylvania, has recognized, a prohibition of Ms. McGinnis' use in a residential zoning district does not depend upon a determination that the proposed commercial use would endanger the public health, safety and welfare. *Euclid v. Ambler Realty Company,* 272 U.S. 365 (1926); *Swade v. Springfield Township Zoning Board of Adjustment,* 392 Pa. 269 (1978). As the Pennsylvania Supreme Court stated in *Swade, supra,* page 270 and 271:

> "We cannot agree with either of these contentions. The very essence of zoning is a designation of certain areas for different purposes. Business may not encroach on residential areas except through the medium of a special exception of variance. The conditions under which a variance can be granted are fully set forth in the Springfield Zoning Ordinance and the Enabling Act.
>
> If the Appellant's first contention is law, then the whole plan and scheme of zoning must be cast aside because business and industry could invade any zone just so long as it could be shown that the

> proposed use would not adversely affect to any reasonable extent the public health, safety or morals. The statutory law of zoning would be replaced by the law of nuisance." (*Swade*, pages 270 and 271).

Ms. McGinnis' reliance upon the Pennsylvania Commonwealth Court cases of *Children's Home of Easton, supra,* and *Hopkins, supra,* to support her argument that her commercial use is permitted in a residential zone is, we submit, clearly misplaced and ignores a fundamental element of the rationale behind these cases in failing to distinguish between a primarily commercial use and a use which is primarily non-profit and residential in nature. Unlike the present case, both *Hopkins* and *Children's Home of Easton* involve uses conducted under the auspices of the Commonwealth of Pennsylvania, which were clearly of a primarily non-profit nature. In *Children's Home of Easton,* an existing biological family with two (2) natural children proposed to take in three (3) foster children. While they were to be compensated to some extent for their care of the foster children, there can be no doubt that their primary use of the property was not for business purposes, but was for residential purposes. Likewise, in *Hopkins,* a non-profit corporation occupied a single-family dwelling in which it proposed to house two (2) adult individuals acting as house parents for three (3) mentally retarded children. Inherent in the Pennsylvania Commonwealth Court's decision in both of these cases to the effect that these circumstances were the functional equivalent of the biological family and could not, therefore, constitutionally be excluded from residential zoning districts, is the basic premise that these uses are primarily non-profit, and not commercial or business. Certainly if the primary aspect of the use was commercial, it cannot, at the same time, be the functional equivalent of a biological family with its interests in preserving familial values. As such, Ms. McGinnis' argument in this case ignores and overlooks substantial

distinctions between her situation and those given protection under Pennsylvania constitutional doctrines in the case of *Children's Home of Easton, supra,* and *Hopkins, supra.*

The Pennsylvania Court in its opinion below, recognized not only that Ms. McGinnis' use could constitutionally be excluded because of its primarily commercial nature, but also that it could be excluded because Ms. McGinnis' boarders do not maintain a common household, nor are they the functional equivalent of a biological family, as was the case in *Children's Home of Easton, supra,* and *Hopkins, supra.* On the contrary, Ms. McGinnis' use is primarily institutional. In particular, Ms. McGinnis' use does not involve a situation where unrelated foster or mentally retarded children are living with an existing family consisting of mother and father, and possibly other natural children, in an environment equivalent to that of a biological family. In this case, the residents are all adult individuals who are, by Ms. McGinnis' own admission, basically capable of taking care of themselves. They live with her out of convenience and not out of any substitute for a parent-child or other familiar relationship. These individuals, unlike family members, do not share in the duties or expenses of maintaining a common household. Instead, as do any other boarders, they pay Ms. McGinnis a fixed monthly or weekly sum in compensation for the room and board provided them. The monies paid, while varying with respect to individuals on the basis of what they can afford or what the traffic will bear, are not in any way correlated to each boarder's share of the expense of maintaining the home. In fact, the charge for the boarders does not vary depending upon how many there are in the home, but remains constant. The mere fact that some of the boarders gratuitously help out with chores, have free run of most of the house, and have feelings toward one another, does not, as Ms. McGinnis suggests, make these individuals any less boarders, and somehow convert them magically into something analogous to a family. Furthermore, as the Pennsylvania Commonwealth Court

recognized there are other distinctions between petitioner's use and those sanctioned by the Pennsylvania courts in the *Hopkins* and *Children's Home of Easton* cases, including the transient nature of the residence of Ms. McGinnis' boarders, and the similarity of her use to that of an institutional facility. The record supports the fact that most of Ms. McGinnis' boarders live with her out of convenience pending relocation with family members or institutionalization. As the Pennsylvania Commonwealth Court stated:

> "The record here reveals that during the course of the hearings before the board at least one and perhaps two of the residents at Ms. McGinnis' home had gone elsewhere. Each resident is free to leave at any time unfettered by the legal, social and moral bonds — including those bonds created, for example, by a commitment to the task of child rearing — that import greater stability to nuclear families. In sum, each of these cases must turn on its facts and with the exception of the age of the residents, the living arrangement here involved is very much like that of *Belle Terre* and unlikely to be mistaken for a nuclear family."

In light of the foregoing, we submit that there is clearly a rational basis for distinguishing between Ms. McGinnis' use and those uses in *Hopkins* and *Easton Home*. Unlike petitioner's proposed use, these latter uses involve foster or mentally retarded children living with an adult couple in a domestic environment intentionally structured under the auspices of agencies of a state so as to mirror a traditional nuclear family. Petitioner's use, on the contrary, as the Pennsylvania courts noted, is much more akin to the situation found in *Belle Terre*,

supra, which this Court held could constitutionally be excluded from a residential zone.

While petitioner argues that the holding of the Pennsylvania Court prohibits a valuable service to the community and will result in confining the elderly to institutional care, this argument not only begs the question, but is incorrect. As petitioner concedes, seventeen percent (17%) of the land in Langhorne Manor Borough is zoned so as to permit Ms. McGinnis' use. The Borough, consistent with the legitimate purpose of zoning, does not prohibit Ms. McGinnis' use, but merely requires that it be located in a certain district within the Borough. As such, the exclusion of Ms. McGinnis' use from the most restrictive residential zone creates no more of a hardship upon her and her boarders than does the exclusion from that zone of those people who desire to reside in apartments or mobile home parks. As long as reasonable space has been provided for such a use, the Borough ordinance cannot be subject to constitutional challenge.

III.

The asserted issue regarding the elderly residents of petitioner's home is not properly before this Court where those residents are not, nor have they ever been, a party to the action, and where such asserted rights have not been properly raised below.

It should initially be pointed out that the residents of the McGinnis home, although they were afforded the opportunity to become parties before the Borough Zoning Hearing Board, did not choose to do so and are not now parties to the present action, nor were they ever parties before any of the proceedings before the Borough Zoning Hearing Board, the Local Pennsylvania Common Pleas Court, or the Pennsylvania Commonwealth Court. The only parties to this action, and, therefore, the only parties having standing to raise argument, are petitioner Theresa

McGinnis, the Langhorne Manor Borough Zoning Hearing Board and respondent herein, Langhorne Manor Borough. As such, the law is clear that the residents have no standing in this proceeding to assert any purported constitutional right. Furthermore, no question or issue with respect to the constitutional rights of Ms. McGinnis' customers were ever raised below and, as such, no federal question was timely or properly raised below and this Court does not have jurisdiction to review, on writ of certiorari, any allegations with respect to a deprivation of the rights of the customers of Ms. McGinnis.[4] Supreme Court Rule of Procedure 2l(1)(h).

Furthermore, even if this novel issue is addressed, it appears clear beyond argument that due process requires no further proceedings than have been afforded in this case. Any of the residents of the home had the opportunity to intervene in this proceeding before the Zoning Hearing Board, or subsequently, at any stage of the proceedings to the extent that they were aggrieved parties or parties in interest under the terms of the Pennsylvania Municipalities Planning Code, the state statute governing zoning appeals. As such, the residents of the home were actually afforded the opportunity to become parties to a hearing wherein they could assert any rights necessary to protect their interest. The opportunity for participation in such a hearing certainly complies with any due process rights that these elderly residents have, and they cannot now complain about a lack of due process where they failed to take the opportunity afforded them in the first place.

---

4. The only issues raised in argument before the Court of Common Pleas of Bucks County and the Pennsylvania Commonwealth Court were that the constitutional rights of the petitioner, Theresa McGinnis, as the property owner, were being violated.

Finally, it should be pointed out that this situation is far different than those cited in support of petitioner's argument which involved the transfer of patients subject to the jurisdiction of a federal agency. The case at bar merely involves a zoning appeal and, therefore, the precedents cited by petitioner are totally inapplicable.

CONCLUSION

The Langhorne Manor Borough Zoning Ordinance, the validity of which has been upheld by the Appellate Courts of Pennsylvania, permits as of right, with an outside number limit, unrelated individuals to reside together as long as they live in a non-profit environment and maintain a common household, *i.e.*, where the arrangement is the functional equivalent of a biologically related family such as a foster home or similar situation.

Petitioner in this case suggests that this Court should invalidate the aforesaid ordinance on federal constitutional grounds since it does not afford unrelated individuals the right to live together in the Borough's most restrictive residential zoning district where the nature of such use is primarily commercial or institutional. In support of its position, petitioner cites no case in any jurisdiction either state or federal, which has even suggested that the federal constitution affords such a right. As such, it is submitted that the instant petition does not present any special or important issues of federal law, nor does it involve an issue upon which federal or state court decisions are in conflict. As such, grant of certiorari should be denied.

Respectfully submitted,

EDWIN N. POPKIN

BEGLEY, CARLIN & MANDIO
Attorneys for Respondent
Langhorne Manor Borough